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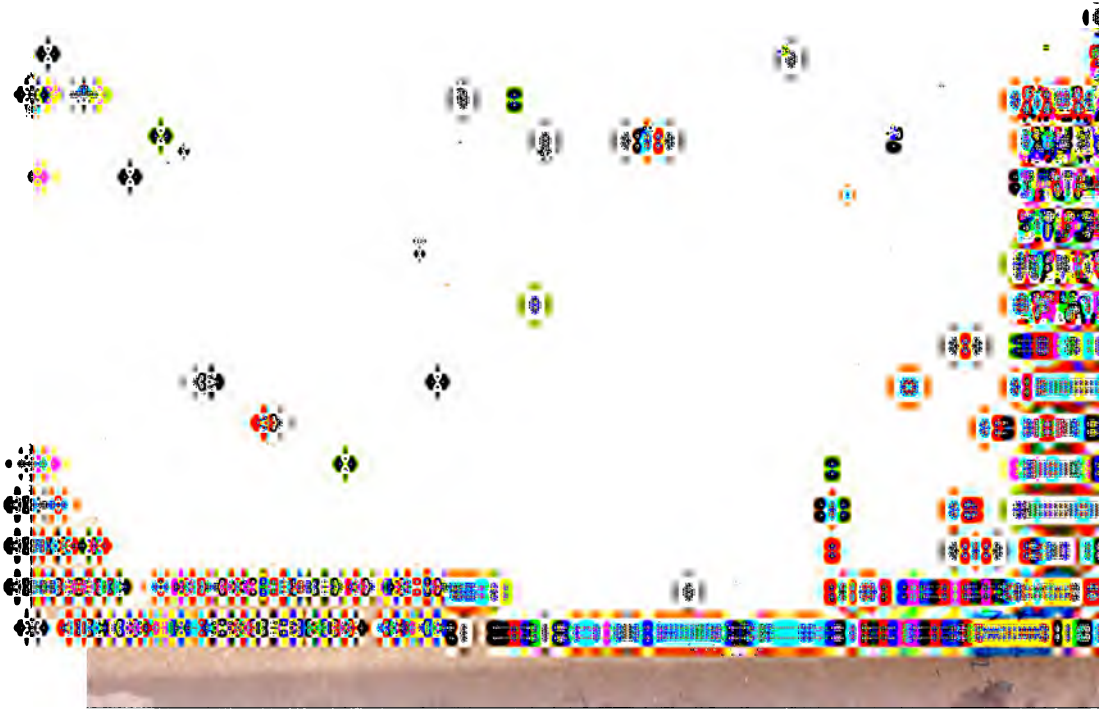

Shipping and Admiralty.

A

MANUAL OF THE LAW

RELATING TO

SHIPPING AND ADMIRALTY

As determined by the Courts of England
and the United States.

BY

ROBERT DESTY,

Author of "Federal Procedure," "Federal Citations," "Statutes relating to Commerce, Navigation and Shipping," etc.

SAN FRANCISCO:
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PREFATORY.

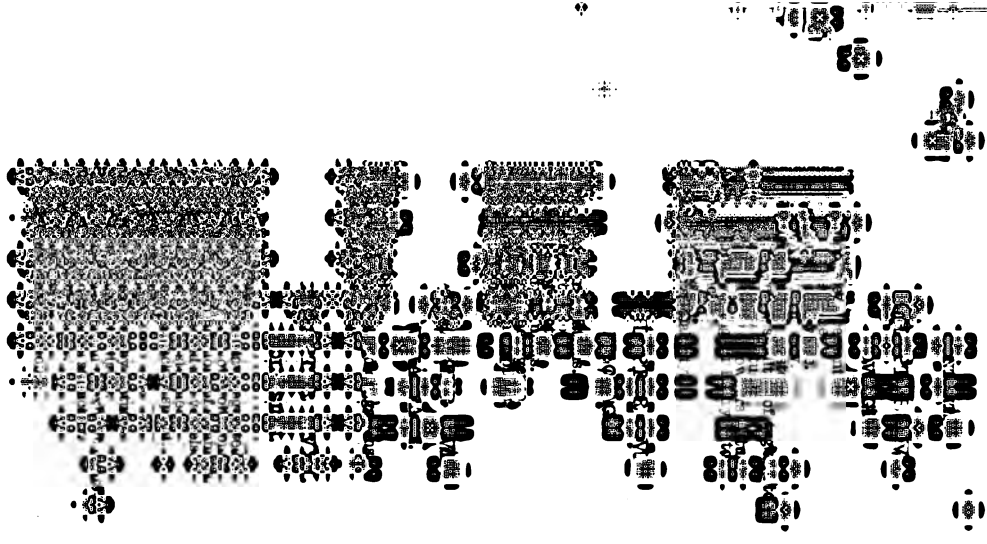
Regardless of traditional forms, the Author has endeavored to put the results of his labors into the smallest space, with the most convenient arrangement—prospecting in old fields, exploring unbeaten paths, and blazing the way for short cuts by those who seek with anxious haste for new or ancient treasures.

If this little innovation contains more points and authorities than larger works on the same subject, the fact is due chiefly to the preparation and use of the "FEDERAL CITATIONS." If it should meet with the favor bestowed upon the latter work and "FEDERAL PROCEDURE," it will be followed by a "MANUAL OF ADMIRALTY PRACTICE"

A companion volume of annotated "STATUTES RELATING TO COMMERCE, NAVIGATION, AND SHIPPING," which will, it is hoped, prove useful to Shippers, Masters, and their legal advisers, is now passing through the press.

ROBERT DESTY.

SAN FRANCISCO, February 16th, 1879.



8 New York *v.* Miln, 11 Pet. 102; U. S. *v.* Coombs, 12 Pet. 72; Gilman *v.* Philadelphia, 3 Wall. 713.

9 Gibbons *v.* Ogden, 9 Wheat. 1; U. S. *v.* New Bedford Bridge, 1 Wood. & M. 486; Brown *v.* Maryland, 12 Wheat. 419.

10 U. S. *v.* Duluth, 1 Dill. 172; Cooley *v.* Port Wardens, 12 How. 299; Sinnot *v.* Davenport. 22 How. 227; Halderman *v.* Beckwith, 4 McLean, 286; Rogers *v.* Cincinnati, 5 Ibid. 337.

11 Gibbons *v.* Ogden, 9 Wheat. 1; U. S. *v.* Coombs, 12 Pet. 78; Groves *v.* Slaughter, 15 Pet. 514; The Panama, Dudley, 35; Brown *v.* Maryland, 12 Wheat. 445; State Tonnage Tax Cases, 12 Wall. 214; The Daniel Ball, 1 Brown, 199; Blanchard *v.* The Martha Washington, 1 Cliff. 472; The William Jarvis, 1 Sprague, 437; North River S. B. Co. *v.* Livingston, 3 Cow. 743; Passenger Cases, 7 How. 439; The Chusan, 2 Story, 464; Clinton Bridge, Wool. 165; People *v.* Brooks, 4 Denio, 469; N. Y. *v.* Miln, 11 Pet. 134; South Carolina *v.* Georgia, 93 U. S. 4.

12 Gibbons *v.* Ogden, 9 Wheat. 1; Chy Lung *v.* Freeman, 92 U. S. 275. And see Matter of Ah Fong, 13 Amer. Law Reg. 761.

13 U. S. *v.* The James Morrison, Newb. 247; U. S. *v.* The William Pope, Newb. 258.

14 Gibbons *v.* Ogden, 9 Wheat. 1; Cooley *v.* Port Wardens, 12 How. 299; Steamship Co. *v.* Joliffe, 2 Wall. 468; Crandall *v.* Nevada, 6 Wall. 42; Osborne *v.* Mobile, 16 Wall. 482; Banta *v.* McNeil, 5 Ben. 75; The Ann Ryan, 7 Ben. 23; Matter of Freeman, 2 Curt. 495; The Wave *v.* Hyer, 2 Paine, 144; Clinton Bridge, Wool. 166; Gilman *v.* Philadelphia, 3 Wall. 713.

15 The James Morrison, Newb. 246; Gibbons *v.* Ogden, 9 Wheat. 1.

16 Gilman *v.* Philadelphia, 3 Wall. 713; The Daniel Ball, 10 Wall. 564; Martin *v.* Acker, Blatchf. & H. 280; The Thomas Swan, 6 Ben. 45; Clinton Bridge, Wool. 166; Woodman *v.* Kilbourn Manf. Co. 1 Abb. U. S. 158; Gibbons *v.* Ogden, 9 Wheat. 1; Corfield *v.* Coryell, 4 Wash. 378; Silliman *v.* Troy & W. T. B. Co. 11 Blatchf. 283; Ex parte McNiel, 13 Wall. 240.

17 Gibbons *v.* Ogden, 9 Wheat. 1; Gilman *v.* Philadelphia, 3 Wall. 725; The Daniel Ball, 10 Wall. 563; The Genessee Chief, 12 How. 443; U. S. *v.* The New Bedford Bridge, 1 Wood. & M. 498; Corfield *v.* Coryell, 4 Wash. 378.

18 Gibbons *v.* Ogden, 9 Wheat. 1; New York *v.* Miln, 11 Pet. 147; Brown *v.* Maryland, 12 Wheat. 419; Gilman *v.* Philadelphia, 3 Wall. 737; The James Morrison, Newb. 246.

19 Pennsylvania *v.* Wheeling & B. Br. Co. 18 How. 421; S. C. 13 How. 518; Works *v.* Junction R. R. Co. 5 McLean, 425; U. S. *v.* Duluth, 1 Dill. 469; S. C. 10 Amer. Law Reg. N. S. 449.

20 The Daniel Ball, 1 Brown Adm. 197; The Passenger Cases, 7 How. 282.

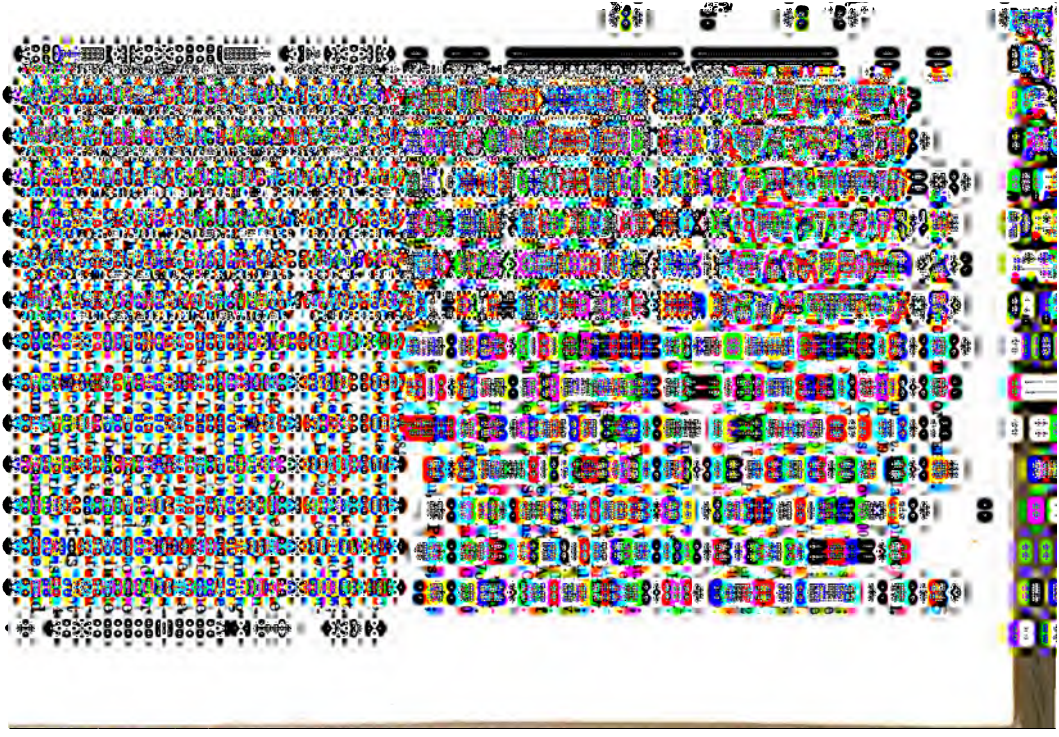
21 Pennsylvania *v.* Wheeling Bridge, 18 How. 421; Gilman *v.* Philadelphia, 3 Wall. 727; Martin *v.* Acker, Blatchf. & H. 280.

22 State Freight Tax Case, 15 Wall. 279; Roberts *v.* Skolfield, 3 Ware, 191.

23 New York *v.* Miln, 11 Pet. 146; Prigg *v.* Commonwealth, 16 Pet. 655; Passenger Cases, 7 How. 394.

24 White's Bank *v.* Smith, 7 Wall. 656; Mitchell *v.* Steelman, 8 Cal. 363; The Martha Washington, 15 Law Rep. N. S. 22; Fontaine *v.* Beers, 19 Ala. 722; Shaw *v.* McCandless, 36 Miss. 296.

§ 3. Powers reserved to States.—The mere grant of power, by the Constitution, to Congress, is not *per se*, and without any exercise of that power by Congress, an abso-



used for pleasure only, is not within the inspection laws of Congress.[5] A steamboat navigating from one town to another in the same State, engaged exclusively in domestic commerce, need not be inspected.[6] A steamboat employed in transporting passengers between ports of the same State is not liable to the penalty for not having the hull and boilers inspected under the act of Congress of August 30th, 1852.[7] Nor is a steamer employed in transporting merchandise only.[8] A coasting vessel employed in the transportation of passengers is as much a part of the merchant marine as is one employed in the transportation of a cargo.[9] A penalty is provided for not having life-preservers and for not having the boilers inspected.[10] More than six months must not elapse after one examination, before another is made.[11] Vessels under way, except on the high seas, are to be under the control of a pilot, licensed by the inspector of steam vessels.[12]

1 Gibbons *v.* Ogden, 9 Wheat. 1; Neilson *v.* Garza, 2 Wood, 287; Conway *v.* Taylor, 1 Black, 633; Slaughter-House Cases, 16 Wall. 63. And see Rev. Stats. sec. 4336.

2 U. S. *v.* Sunswick, 15 Int. Rev. Rec. 154; The Bright Star, Woowl. 273. And see Rev. Stats. secs. 4369–4462.

3 U. S. *v.* Moore, 2 Bond, 34.

4 Lac LaBelle, 3 Biss. 313; S. C. 11 Am. L. Reg. 557; 16 Int. Rev. Rec. 56.

5 U. S. *v.* The Mollie, 2 Woods, 318.

6 The Oconto, 5 Biss. 463; Gilman *v.* Philadelphia, 3 Wall. 713; The Bright Star, Woolw. 274; Gibbons *v.* Ogden, 9 Wheat. 1; The Thomas Swan, 6 Ben. 42; The Sylph, 4 Blatchf. 24.

7 The Seneca, 1 Biss. 371.

8 The Propeller Sun, 1 Biss. 373.

9 Passenger Cases, 7 How. 437. And see Rev. Stats. sec. 4401.

10 The Thomas Swan, 6 Ben. 42; The Daniel Ball, 10 Wall. 557.

11 Virginia &c. Nav. Co. *v.* U. S. Taney, 418. And see Rev. Stats. secs. 4463–4500.

12 The Bright Star, Wool. 273; Steamship Co. *v.* Joliffe, 2 Wall. 450.

§ 6. Clearance and entry.—Congress has exclusive power to establish ports of entry.[1] A clearance is necessary for every vessel sailing on the ocean.[2] A vessel is not admitted to entry, nor can her cargo be admitted, or unladen in port, or the vessel depart, without the payment of port charges.[3] A discharge of a cargo into lighters is not an unloading under the act providing for landing foreign goods in the day-time and with a permit.[4] Coasting vessels of less than twenty tons burden are not required to enter or exhibit a manifest.[5] Where articles are purchased abroad for equipment of the vessel, and remain on board at her arrival, they need not be reported on the manifest.[6]

an agent or partner in some house of trade, consisting of citizens of the United States actually carrying on trade within the United States.

U. S. v. Gillies, Pet. C. C. 159. And see Rev. Stats. sec. 4133, as to vessels owned by non-resident naturalized citizens; see Ibid. sec. 4134.

§ 12. Where to be registered.—Every vessel built and owned within the United States shall be registered at its home port [1] by the collector of that collection district which includes the port at or nearest to which the owner, or if there be more than one owner, then the husband or managing owner usually resides.[2] The registry of a vessel in one State, when the owner resided in another, does not make her a domestic vessel;[3] so, where a vessel was built in one State for parties resident in another State, her home port was in the former State until after her delivery and first voyage.[4] Where the ship's husband had his legal domicile in one State, but passed two-thirds of his time and did business in another State, the latter State was the proper district for enrolling and licensing the vessel.[5]

1 Hill v. The Golden Gate, Newb. 308.

2 Hays v. The Steamship Co. 17 How. 596; St Louis v. The Ferry Co. 11 Wall. 432; Morgan v. Parham, 16 Wall. 477; Crapo v. Kelly, Ibid. 475; Blanchard v. The Martha Washington, 1 Cliff. 495; Pickell v. The Loper, Taney, 500. And see Rev. Stats. sec. 4141; Collins v. The Fort Wayne, 1 Bond, 491; Dudley v. The Superior, Newb. 176.

3 Thomas v. The Kosciusko, 11 N. Y. Leg. Obs. 38; Tree v. The Indiana, Crabbe, 497.

4 Scott v. The Plymouth, Newb. 53; 6 McLean, 463; Thomas v. The Kosciusko, 11 N. Y. Leg. Obs. 33; Tree v. The Indiana, Crabbe, 497.

5 The St. Lawrence, 3 Ware, 211; Hull of a New Brig, 3 Law Rep. 69. But see Levering v. The Bank of Columbia, 1 Cranch C. C. 152.

§ 13. Oath, and forfeiture for false swearing.—In order to the registry of a vessel an oath shall be taken and subscribed by the owner, or one of the owners, before the officer authorized to make such registry,[1] and if any of the matters of fact alleged in the oath taken pursuant to the statute shall, within the knowledge of the party so swearing, be not true, the vessel, together with her tackle, apparel, and furniture, shall be forfeited.[2] Where one of two partners swear that he and his partner, "of the city of New York," are the sole owners, when in fact his partner is domiciled abroad, the vessel was held liable to forfeiture, although the statement was made in good faith, and under a misconception of the effect of a foreign domicile.[3]

1 The Active, Olcott, 236; Weston v. Penniman, 1 Mason, 306. And see Rev. Stats. sec. 4142, as to oath by officer of corporation. See Ibid. sec. 4139; by master, Ibid. sec. 4144; by foreigner, Ibid. sec. 4130; by agent, Ibid. sec. 4163.

2 U. S. v. Grundy, 3 Cranch, 337; The Venus, 8 Cranch, 253; The Neptune, 3 Wheat. 601; The Fidelitier, Deady, 644; U. S. v. The Reindeer, 2 Cliff. 68. And see Rev. Stats. sec. 4143.

3 The Venus, 8 Cranch, 253.

§ 14. Bond on registry.—The ship's husband, or acting and managing owner, together with the master of the vessel, is required by statute to give a bond, conditioned that the certificate of registry shall be used solely for the vessel for which it is granted;[1] and that in case of the sale of the vessel to a foreigner the register shall be given up on arrival.[2] Under the Embargo Act, a registered vessel, after giving bonds, was liable to forfeiture for proceeding to a foreign port.[3]

1 U. S. v. Montell, Taney, 47; Allen v. U. S. Ibid. 118; Sinnot v. Davenport, 22 How. 227. And see Rev. Stats. secs. 4145, 4146.

2 The Margaret, 9 Wheat. 421; The Maria, Deady, 100.

3 The William King, 2 Wheat. 148. And compare The Short Staple v. U. S. 9 Cranch, 55.

§ 15. Forfeiture for fraudulent registry.—Forfeiture attaches in case of the fraudulent use of the register.[1] The penalty attaches on vessels registered under acts passed subsequent to the original act;[2] but the special act of April 25th, 1863, being mandatory, no oath was necessary to secure registry, enrollment, and license of the vessels specified therein.[3] The forfeiture for a fraudulent registry is not defeated by a subsequent sale to a *bona fide* purchaser;[4] but where a vessel, belonging in part to a foreigner, was subsequently sold to one ignorant of the fraud, she was not subject to forfeiture.[5] In cases of forfeiture, the absolute property does not vest in the United States until the manifestation of an option to take the ship and not its value.[6] The provisions in the statute as to forfeiture apply to enrolled as well as to registered vessels.[7]

1 The Neptune, 3 Wheat. 601; The Luminary, 8 Wheat. 407; The Margaret, 9 Wheat. 431; U. S. v. The Burdett, 9 Peters, 682. And see Rev. Stats. sec. 4189.

2 The Mohawk, 3 Wall. 566.

3 The Acorn, 2 Abb. U. S. 438.

4 The Monte Cristo, 6 Ben. 148; The Florenzo, Blatchf. & H. 82: The Distilled Spirits, 11 Wall. 368.

5 U. S. v. The Anthony Mangin, 2 Pet. Adm. 452.

6 U. S. v. Grundy, 3 Cranch, 337.

7 The Acorn, 2 Abb. U. S. 436; The Mohawk, 3 Wall. 566.

§ 16. New registry on sale or alteration.—A registered vessel sold or transferred to a citizen of the United States,[1] or altered in form or burden, or from one denomination to another, shall be registered anew, otherwise she

loses her national character.[2] To show that a vessel ceased to be American by sale abroad it must appear that she was transferred to a foreigner.[3] If a vessel be sold abroad, and be repurchased on her arrival at her home port, she will not thereby lose her national character.[4] The sale of a vessel to a corporation in a foreign country is a sale to a subject or citizen of a foreign State prohibited by the Act of Congress.[5]

1 U. S. *v.* The Forrester, Newb. 81; Johnson *v.* Merrill, 122 Mass. 153; U. S. *v.* The Hawke, Bee, 34. And see Rev. Stats. sec. 4159.

2 U. S. *v.* Willing, 4 Cranch, 43, affirming S. C. 1 Wash. C. C. 125; S. C. 4 Dall. 374; Insurance Co. *v.* Polleys, 13 Peters, 157; Weston *v.* Penniman, 1 Mason, 305; Ohl *v.* Eagle Ins. Co. 4 Mason, 172; D'Wolf *v.* Harris, 4 Mason, 515. And see Rev. Stats. sec. 4170; penalty for neglect, Ibid. sec. 4169; sale to foreigner, Ibid. sec. 4165; registry upon sale abroad, Ibid. sec. 4166; upon sale under legal process, Ibid. sec. 4164.

3 U. S. *v.* Gordon, 5 Blatchf. 18; U. S. *v.* Willing, 4 Cranch, 43, affirming 1 Wash. C. C. 125; S. C. 4 Dall. 374. And see Rev. Stats. sec. 4172.

4 U. S. *v.* Willing, 4 Cranch, 43. And see Rev. Stats. sec. 4173.

5 The Maria, Deady, 89. And see Rev. Stats. sec. 4165.

§ 17. Temporary register to be given up.—The temporary register is superseded by the permanent,[1] which must issue from and be recorded in the office of the collector of the home port of the vessel.[2] A penalty is provided by the statute for neglect to deliver up a temporary register on the arrival of the vessel at her home port.[3] Arrival means not an accidental arrival, or one from necessity, but intentionally, as of one of the termini of the voyage.[4] In the certificate surrendered the purchaser has no interest.[5] The temporary register is to be delivered up.[6]

1 Chadwick *v.* Baker, 54 Me. 9.

2 Blanchard *v.* The Martha Washington, 1 Cliff. 463.

3 U. S. *v.* Shackford, 5 Mason, 445; 1 Ware, 171.

4 U. S. *v.* Shackford, 5 Mason, 445; 1 Ware, 171; The Vincennes, 21 Law. Rep. 616. And see Rev. Stats. sec. 4323.

5 Mitchell *v.* Taylor, 32 Me. 434; Catlett *v.* Insurance Co. 1 Paine, 594. See Rev. Stats. sec. 4160; transmission of, Ibid. sec. 4174.

6 The Margaret, 9 Wheat. 421; The Maria, Deady, 100.

§ 18. Effect of registry.—The registry of vessels is not compulsory on the owners.[1] A mortgagee may take out a register in his own name.[2] The effect of registry is to confer on vessels a national character, and entitle them to the protection of the national flag;[3] hence, the registry, enrollment, and license of vessels are regulated by acts of Congress,[4] the power to regulate commerce being exclusively in Congress.[5]

1 Davidson *v.* Gorham, 6 Cal. 343.

2 Ring *v.* Franklin, 2 Hall, 1.

3 Hosey v. Buchanan, 16 Peters, 215; Crapo v. Kelly, 16 Wall. 633; Fox v. The Lodemia, Crabbe, 271; The Martha Washington, 15 Law. Rep. N. S. 22.

4 Morgan v. Parham, 16 Wall. 471; Silliman v. The Troy & West Troy Bridge Co. 11 Blackf. 285; Heaketh v. Stevens, 7 Barb. 488.

5 Gibbons v. Ogden, 9 Wheat. 1; Willson v. Blackbird C. M. Co. 2 Peters, 245; The License Cases, 5 How. 583; Pennsylvania v. Wheeling Bridge Co. 13 How. 519; Sinnot v. Davenport, 22 How. 227; Foster v. Davenport, 22 How. 244.

§ 19. Registry as evidence. — The registry is only *prima facie* evidence of the port to which the vessel belongs,[1] but it is conclusive that she was in a fit state to be registered.[2] If obtained on the oath of one, it is *prima facie* evidence of the ownership of all;[3] but it is not *prima facie* evidence of the ownership of a party named therein.[4] In connection with other evidence it is admissible in favor of one claiming as owner,[5] but not to charge a party as owner when made on the oath of another unless confirmed by auxiliary proof,[6] as it may be shown by parol that there were other owners,[7] or that several owners are jointly interested, although the registry is in the name of one only.[8] The real owner, who claims as builder, may show by parol evidence that his claim is well founded, and that the builder's certificate and registry and enrollment were fraudulently made and issued in the name of another.[9] It is conclusive as to who is master,[10] and as to the vessel insured.[11] The presumption that a vessel belongs to the port at which she is enrolled is strengthened by the fact that she bears her name on her stern.[12]

1 Hill v. The Golden Gate, Newb. Adm. 312; The Mary Bell, 1 Sawy. 135; McAllister v. The Sam Kirkman, 1 Bond, 369; Tree v. The Indiana, Crabbe, 479; Dudley v. The Superior, Newb. Adm. 176; The Mary Bell, 1 Sawy. 138.

2 Coombes v. Mansfield, 3 Drew. 193.

3 Stokes v. Carne, 2 Camp. 339.

4 Ring v. Franklin, 2 Hall, 1; Bradbury v. Johnson, 41 Me. 562; Jones v. Pitcher, 3 Stewt. & P. 135; U. S. v. Brune, 2 Wall. Jr. 264.

5 Brooks v. Minturn, 1 Cal. 481.

6 Hozey v. Buchanan, 16 Peters, 215; Calais S. Co. v. Van Pelt, 2 Black, 386; Weston v. Penniman, 1 Mason, 306; The S. G. Owens, 1 Wall. Jr. 359; U. S. v. Brune, 2 Ibid. 264; Bas v. Steele, 3 Wash. C. C. 361; Scudder v. Calais S. Co. 1 Cliff. 381; Lord v. Ferguson, 9 N. H. 380; Sharp v. U. S. 14 Johns. 201; Ring v. Franklin, 2 Hall, 1; Fraser v. Hopkins, 2 Taunt. 5; Dyer v. Snow, 47 Me. 254.

7 Wait v. Gibbs, 4 Pick. 297.

8 Vinal v. Burrill, 16 Pick. 401.

9 Calais St. Bt. Co. v. Van Pelt, 2 Black, 386; Scudder v. Calais S. B. Co. 1 Cliff. 381; Everett v. Coffin, 6 Wend. 609; Prescott v. De Forest, 16 Johns. 169; Williams v. Merle, 11 Wend. 80.

10 The Dubuque, 2 Abb. U. S. 20.

11 Ohl v. Eagle Ins. Co. 4 Mason, 390; U. S. v. Bartlett, 2 Ware, 17.

12 Dudley v. The Superior, Newb. 176; Stearns v. Doe, 12 Gray, 482. And see Rev. Stats. sec. 4177.

§ 20. Distinction between registry and enrollment.—Vessels engaged in foreign trade are registered, and those engaged in the coasting and home trade are enrolled. The words "register" and "enrollment" are used to distinguish the certificates granted.[1] The distinction as regards penalties imposed, explained;[2] registry consists of an entry in a book kept by a proper public officer.[3] The vessel may change from registry to enrollment, or from enrollment and license to registry.[4] The Registry Act permits sales of vessels in a foreign port or at sea to foreigners; but the Licensing Act prohibits a sale to foreigners.[5] The act requiring steamers to have their names exhibited on wheel and pilot-houses prescribes the same penalty, but not the same remedy as the act in relation to the names on the stern of vessels.[6]

1 The Mohawk, 3 Wall. 566.

2 U. S. v. The Forester, Newb. 81; U. S. v. Willing, 4 Cranch, 48.

3 U. S. v. The Castillero, 2 Black, 17; S. C. 23 How. 464.

4 U. S. v. Shackford, 5 Mason, 445; U. S. v. Rogers, 3 Sum. 342. And see Rev. Stats. sec. 4322.

5 U. S. v. The Hawke, Bee, 34; The Active v. U. S. 7 Cranch, 100; The Two Friends, 1 Gall. 118; The Julia, Ibid. 233; U. S. v. The Mars, Ibid. 237; The Eliza, 2 Gall. 4; The Nymph, 1 Sum. 516. And see Rev. Stats. sec. 4377.

6 The Lewellen, 4 Biss. 167. And see Rev. Stats. secs. 4177, 4496.

§ 21. Whaling vessels.—Registered vessels, without a license, may be legally employed on a whaling voyage;[1] but without having surrendered her register, or taken out an enrollment and license, she is not an American vessel within the purview of the Act of Congress providing for the punishment of a crew for a revolt.[2]

1 U. S. v. Jenkins, 2 Law Rep. 146.

2 U. S. v. Rogers, 3 Sum. 342.

§ 22. Enrollment of vessels.—The same requirements and qualifications and the same proceedings shall be had in the enrollment of vessels as are prescribed for the registry of vessels.[1] An enrollment made on the oath of the master alone is void,[2] the registry being founded on the oath of the owner and the identification of the property.[3] A canal-boat, without oars, mast, or steam power, is not a ship within the enrollment and license act,[4] nor are open boats;[5] so, as regards payment of the hospital tax by seamen;[6] but a sloop of over fifty tons' burden on the Hudson River is within the statute.[7] The certificate of enrollment of vessels on the northern frontier neces-

sarily engaged in both foreign and domestic commerce is equivalent to both a registry and an enrollment.[8] An omission in the registry or enrollment of an American vessel does not make her a foreign vessel—it only deprives her of her American privileges.[9] The delivery of the enrollment and license is not essential.[10] The port where a vessel is enrolled or licensed is her home port.[11]

1 The Mohawk, 5 Wall. 566; The Acorn, 2 Abb. U. S. 434; The Two Friends, 1 Gall. 118; U. S. *v.* The Forrester, Newb. 81; Fox *v.* The Lodemia, Crabbe, 271; Sinnot *v.* Davenport, 22 How. 227. And see Rev. Stats. sec. 4311.

2 U. S. *v.* Bartlett, 2 Ware (Dav.) 1.

3 Ex parte Yallop, 15 Ves. Jr. 60.

4 U. S. *v.* The Penn, 18 Int. Rev. Rec. 56.

5 U. S. *v.* An Open Boat, 5 Mason, 120.

6 Buckley *v.* Brown, 3 Wall. Jr. 199; Martin *v.* Acker, Blatchf. & H. 280. And see Rev. Stats. sec. 4585.

7 Martin *v.* Acker, Blatchf. & H. 280.

8 The Mohawk, 3 Wall. 566; U. S. *v.* The Forrester, Newb. 81. And see Rev. Stats. sec. 4318.

9 Fox *v.* The Lodemia, Crabbe, 271. And see Rev. Stats. sec. 4319.

10 The Planter, Newb. 262. And see Rev. Stats. sec. 4320.

11 Pickell *v.* The Loper, Taney, 500.

§ 23. Rights under enrollment.—The enrollment confers on the vessel the national character and privileges.[1] The enrollment and license gives the holder the right to sail from port to port, to engage in trade, or to carry passengers between the several States.[2] The validity of an enrollment or license does not depend on its delivery.[3] The neglect to enroll a vessel after sale and transfer does not denationalize her, but renders her liable to port fees and tonnage duties in every port.[4]

1 Gibbons *v.* Ogden, 9 Wheat. 212.

2 Morgan *v.* Parham, 16 Wall. 471; Silliman *v.* Troy & West Troy Bridge Co. 11 Blatchf. 235; State Freight Tax Cases, 15 Wall. 232.

3 Gibbons *v.* Ogden, 9 Wheat. 1; Foster *v.* Davenport, 22 How. 244.

4 The Forrester, Newb. 81.

§ 24. Enrollment, of what evidence.—The enrollment of a vessel is conclusive of her character as a domestic vessel at her home port,[1] the *situs* of a vessel as personal property being at the port of her enrollment or license;[2] but it is not conclusive of ownership nor of the party named therein as being master.[3] It is evidence of property so far as it is confirmed by auxiliary circumstances,[4] and the place of enrollment is only *prima facie* evidence of the port to which the vessel belongs.[5] Steamboats owned by citizens of the United States may be en-

rolled and licensed, although they may have been employed in the rebel service.[6]

1 Tree *v.* The Indiana, Crabbe, 479; Dudley *v.* The Superior, Newb. 176; The Troy, Newb. 181.

2 Morgan *v.* Parham, 16 Wall. 471; Crapo *v.* Kelly, Ibid. 630.

3 Jordan *v.* Young, 37 Me. 276; Bixby *v.* Franklin Ins. Co. 8 Pick. 86; Hatch *v.* Smith, 5 Mass. 42; Colson *v.* Bonzey, 6 Greenl. 474; U. S. *v.* The W. F. Johnson, 18 Leg. Int. 334.

4 Dyer *v.* Snow, 47 Me. 254.

5 Hill *v.* The Golden Gate, Newb. 312, citing Sharp *v.* United Ins. Co. 14 Johns. 201, and Leonard *v.* Huntington, 15 Johns. 302; and commenting on Tree *v.* The Indiana, Crabbe, 479; The Albany, 4 Dill. 445.

6 Enrollment of Steamboats, 11 Opin. Att. Gen. 359.

§ 25. License for coasting trade.—The license of a vessel does more than confer a national character on the vessel. It is an authority to carry on trade under the acts of Congress, which are paramount over State enactments.[1] It does not authorize a vessel to navigate the upper waters of a river, entirely within the territorial limits of a State.[2] A vessel licensed for the cod fishery is not authorized to engage in the mackerel fishery, as they are distinct trades; but vessels licensed to catch cod will not be forfeited by catching mackerel, so long as the latter is incidental merely, and not the main object of the pursuit.[3] The license can only be issued to vessels already enrolled.[4] It may be issued to steamers.[5] Delivery is not essential to the validity of a license—it takes effect from its date.[6] The navigation of the waters of a navigable river by a steamboat without a license is not a violation of the steamboat acts, unless passengers or freight was actually carried.[7]

1 Gibbons *v.* Ogden, 9 Wheat. 1; Foster *v.* Davenport, 22 How. 244; Sinnot *v.* Davenport, Ibid. 227; Silliman *v.* Hudson, River Br. Co. 4 Blatchf. 405; Gilman *v.* Philadelphia, 3 Wall. 742; Pennsylvania *v.* Wheeling Bridge Co. 18 How. 421.

2 Veazie *v.* Moor, 14 How. 568.

3 U. S. *v.* The Parryntha Davis, 1 Cliff. 532; S. C. 3 Ware, 161, explaining The Reindeer, 2 Wall. 383; The Nymph, 1 Ware, 257; S. C. 1 Sum. 516; The Harriet, 1 Story, 264; Sinnot *v.* Davenport, 22 How. 227. The Eliza, 2 Gall. 4; The Active *v.* U. S. 7 Cranch. 100.

4 Gibbons *v.* Ogden, 9 Wheat. 1; Sinnot *v.* Davenport, 22 How. 227.

5 The Planter, Newb. 262.

7 Briscol *v.* Hinman, 10 Int. Rev. Rec. 53; Elizabethport & F. Co. *v.* U. S. 5 Blatchf. 198; The Sylph, 4 Blatchf. 24. And see Rev. Stats. sec. 4218.

§ 26. Coasting trade defined.—Trade is equivalent to occupation, employment, or business for gain.[1] The words "coasting trade" mean the trade along the shore.[2] Vessels navigating from port to port in the same State

are in the coasting trade if constituting a link in the chain of commerce between States,[3] but this does not apply to ferry-boats, though plying between separate States.[4] Foreign vessels, owned wholly by citizens of the United States, may be engaged in the coasting trade, the only liability being that of paying the tonnage duties chargeable on foreign vessels.[5]

1 The Nymph, 1 Sum. 516, affirming S. C. 1 Ware, 257.

2 U. S. *v.* The James Morrison, Newb. 241; U. S. *v.* The William Pope, Ibid. 256; Sinnot *v.* Davenport, 22 How. 227.

3 U. S. *v.* The James Morrison, Newb. 241; Pickell *v.* The Loper, Taney, 500.

4 U. S. *v.* The James Morrison, Newb. 241; U. S. *v.* The William Pope, Ibid. 256; The Ottowa, Ibid. 536; The Planter, Ibid. 265.

5 Employment of Foreign Vessels, 4 Opin. Att'y Gen. 69; Ibid. 188; Ibid. 270.

§ 27. Forfeiture for proceeding on foreign voyage.—A licensed vessel is subject to forfeiture for proceeding on a foreign voyage.[1] The term "foreign voyage" means a voyage intended to some place beyond the territorial jurisdiction of the United States,[2] but although to a foreign port, a voyage, if within the usual course of vessels licensed for the fisheries, is not a foreign voyage.[3] A vessel cannot be arrested as having proceeded on a foreign voyage until she is outside the limits of the harbor of her port of departure.[4] So, forfeiture is not incurred by merely dropping down the bay and anchoring at a customary place, if no intention was manifested to commence the voyage,[5] nor, by leaving the wharf with intention to go to sea, while yet remaining in the port.[6] A coaster cannot be sold in a foreign port, unless her license be previously surrendered.[7] Merely touching at or entering a foreign port for supplies, or for any purpose other than for trade, is not a violation of the statute.[8]

1 The Active *v.* U. S. 7 Cranch, 100; The Resolution, 2 Gall. 47; U. S. *v.* The Mars, 1 Gall. 237; The Julia, 1 Gall. 43; The Eliza, 2 Gall. 7; U. S. *v.* The Paryntha Davis, 3 Ware, 162; Taber *v.* U. S. 1 Story, 1; U. S. *v.* The Hawke, Bee, 34; The Friendship, 1 Gall. 45; The Lark, Ibid. 55; The Three Brothers, Ibid. 142. And see Rev. Stats. sec. 4337.

2 The Lark, 1 Gall. 55; The Atlantic, 1 Ware, 121.

3 The John Martin, 2 Abb. U. S. 172; The Three Brothers, 1 Gall. 142; Taber *v.* U. S. 1 Story, 1.

4 The Julia, 1 Gall. 43; The Friendship, Ibid. 45; The Active *v.* U. S. 7 Cranch, 100, affirming S. C. 1 Paine, 247.

5 The Active *v.* U. S. 7 Cranch, 100, affirming S. C. 1 Paine, 247; The Julia, 1 Gall. 43.

6 U. S. *v.* The George Darby, 16 Law Rep. N. S. 566.

7 U. S. *v.* The Hawke, Bee, 34. And see Rev. Stats. sec. 4325.

8 The Ocean Spray, 4 Sawy. 105.

§ 28. Forfeiture for illegal traffic.—A vessel licensed for the coasting trade is forfeited if she be employed in a trade other than that for which she is licensed.[1] Any engagement in unauthorized or illegal traffic, or any employment beyond the scope of the license, works a forfeiture.[2] A licensed fishing vessel, touching at a foreign port, and merely taking on packages to transport free of charge, or merely calling in at a foreign port for wood and water, is not forfeited for an illegal traffic.[3] So, the merely having on board foreign goods without exhibiting a manifest, is not a cause for forfeiture.[4] A vessel, though not enrolled and licensed, is not forfeited by having foreign goods on board, if engaged exclusively in foreign trade.[5] Where a licensed tow-boat carried upon one trip a single passenger, it does not constitute her a passenger boat, needing a license therefor.[6] A vessel is liable to forfeiture for acts of which the owner may be innocent.[7] The act of Congress provides a penalty for the transportation of goods of foreign growth or manufacture across the several States.[8] Although a licensed fishing vessel is liable to forfeiture for carrying goods destined for another place, without a license, yet the cargo is not forfeited unless it belongs to the master, owners, or a mariner.[9] It is not necessary to the liability to the penalty that it should appear that the master had knowledge that the goods were on board.[10] The forfeiture is to apply to cases where foreign merchandise is not included at all in the manifest, and not when it was not legally precise, and with no bad faith.[11]

1 U. S. *v.* The Mars, 1 Gall. 237; The Two Friends, Ibid. 118; The Resolution, 2 Gall. 47; The Active *v.* The U. S. 7 Cranch. 100.

2 The Active *v.* The U. S. 7 Cranch, 100, affirming S. C. 1 Paine, 247; U. S. *v.* The Paryntha Davis, 1 Cliff. 532; S. C. 3 Ware, 161; The Nymph, 1 Ware, 257; S. C. 1 Story, 516; The Reindeer, 2 Wall. 383; The Eliza, 2 Gall. 4; The Julia, 1 Gall. 233; U. S. *v.* The Hawke, Bee, 34. And see Rev. Stats. sec. 4377.

3 The Willie G. 11 Int. Rev. Rec. 117.

4 The America, 1 Gall. 231. And see Rev. Stats. secs. 4351, 4352, 4355.

5 U. S. *v.* The Margaret Yates, 22 Vt. 663; The America, 1 Gall. 231. And see U. S. *v.* Carr, 8 How. 1.

6 The Morning Star, 4 Biss. 62.

7 U. S. *v.* The Cuba, 2 Hughes, 489.

8 Priestman *v.* U. S. 4 Dall. 28; U. S. *v.* The Forester, Newb. 81. And see Rev. Stats. sec. 4363.

9 The Active, 7 Cranch, 100; The Two Friends, 1 Gall. 118. And see Rev. Stats. sec. 4378.

10 U. S. *v.* Carr, 8 How. 1. And see Rev. Stats. sec. 4353.

11 U. S. *v.* The Missouri, 9 Blatchf. 434; U. S. *v.* The Queen, 11 Blatchf. 419.

claim of title,[1] and title may pass by delivery under parol contract,[2] and may be proved by parol.[3] The delivery of a vessel by her builder to an agent, vests title in the principal;[4] but no party becomes the owner of a vessel built under a contract until the final completion and delivery thereof.[5] The legal title and equitable interests in a vessel may be in different persons,[6] and equitable ownership may be shown without a bill of sale or register.[7] If the register or other written evidence of ownership does not define the proportions in which the owners hold the property, they will, in the absence of proof to the contrary, be presumed to have equal shares.[8] A person named in the registry as owner is not thereby charged as such unless it is shown that the registry was made under his authority or consent;[9] and if a person by mistake is registered as owner, equity will correct the error.[10] The real owner may prove by parol evidence that the builder's certificate and registry and enrollment have been fraudulently made and issued in the name of another.[11]

1 U. S. v. Amedy, 11 Wheat. 392; Hozey v. Buchanan, 16 Peters, 215; Bas. v. Steele, 3 Wash. C. C. 331; U. S. v. Peterson, 1 Wood. & M. 314; Jackson v. The Julia Smith, Newb. Adm. 61; S. C. 6 McLean, 484; Weaver v. The S. G. Owens, 1 Wall. Jr. 359; Sharp v. United Ins. Co. 14 Johns. 201.

2 Scudder v. Calais S. Co. 1 Cliff. 370; Merritt v. Johnson, 7 Johns. 473; Badger v. Bank of Cumberland, 26 Me. 428.

3 Lyman v. Redman, 23 Me. 289.

4 Scudder v. Calais S. Co. 1 Cliff. 370.

5 The Revenue Cutter No. 2, 4 Sawy. 143; Andrews v. Durant, 11 N. Y. 40; Mucklow v. Mangles, 1 Taunt. 318; Stringer v. Murray, 2 Barn. & Ald. 248; Merritt v. Johnson, 7 Johns. 473.

6 Scudder v. The Calais S. Co. 1 Cliff. 381; Weston v. Penniman, 1 Mason, 306.

7 Hall v. Hudson, 2 Sprague, 65.

8 Glover v. Austin, 6 Pick. 209; Ohl v. Eagle Ins. Co. 4 Mason, 172; Alexander v. Dowie, 1 Hurl. & N. 152; 37 Eng. L. & E. 551.

9 Scudder v. Calais S. Co. 1 Cliff. 370.

10 Holderness v. Lamport, 30 Law J. Ch. 489; 29 Beav. 129.

11 Scudder v. Calais S. Co. 1 Cliff. 370.

§ 31. Owners as tenants in common.—Part owners are not partners, but they are tenants in common of the vessel.[1] Each has a distinct and separate interest,[2] and may sell his interest without the consent of the other part owners.[3] They are not partners without an express contract to that effect.[4] The mere fact of part ownership does not raise a presumption of partnership.[5] The omission of the specification of the shares of each part owner in the register or bill of sale does not constitute part owners other than tenants in common.[6]

6 Jones v. Sims, 6 Port. 138; Jones v. Pitcher, 3 Stewt. & P. 135.

7 The Larch, 2 Curt. 433; Webb v. Peirce, 1 Curt. 111.

§ 33. Obligations of owners.—The general owner is bound to keep the vessel seaworthy, and furnish an adequate number of persons of competent skill and ability to navigate her,[1] and suitable subsistence for the same.[2] A vessel is unseaworthy which is not manned by the necessary officers and crew.[3] In order to be seaworthy, a ship must be furnished with suitable compasses. In case of deviation in one of several compasses, if the master can correct it and steer the proper course, the ship is seaworthy.[4] The owner who is responsible is the person who, having some kind of claim or title, has the control and management of the vessel, and the right to receive her freight and earnings.[5] The owners of a whaling vessel are bound to account for any part of the net proceeds of the cargo coming into their hands, in case of condemnation in a foreign port as unseaworthy.[6] It is the duty of the owners, and of the master as their agent in such case, to send the oil home free of expense to the mariners.[7] As to obligations of owners as carriers, see CARRIERS.

1 The Gentleman, Olcott, 115; Dixon v. The Cyrus, 2 Pet. Adm. 407; Lanahan v. Universal Ins. Co. 1 Peters, 183; The Moslem, Olcott, 289; Putnam v. Hood, 3 Mass. 481; Rice v. The Polly and Kitty, 2 Pet. Adm. 420; Silva v. Low, 1 Johns. 184. But see Couch v. Steel, 3 El. & B. 402; 24 Eng. L. & E. 77.

2 Foster v. Sampson, 1 Sprague, 182; The Childe Harold, Olcott, 277; Mariners v. The Washington, 1 Pet. Adm. 219; The Harriet, Bee, 80.

3 The Planter, 2 Woods, 490.

4 Lord v. Goodall N. & P. S. S. Co. 4 Sawy. 292.

5 Dungan v. Pentz, 2 Hughes, 69; Duff v. Bayard, 4 Watts & S. 240; Blanchard v. Freaning, 4 Allen, 118; Howard v. Odell, 1 Allen, 85; Ring v. Franklin, 2 Hall, 19; Birbech v. Tucker, 2 Hall, 121; Macy v. Wheeler, 30 N. Y. 231; Meyers v. Willis, 33 Eng. L. & E. 204; affirmed, 36 Ibid. 350.

6 Joy v. Allen, 2 Wood. & M. 303; The Riby Grove, 2 W. Rob. 52.

7 Jay v. Allen, 1 Sprague, 132; Joy v. Allen, 2 Wood. & M. 310; Bishop v. Shepherd, 23 Pick. 492; Wilkinson v. Frazier, 4 Esp. 182; The Frederick, 5 C. Rob. 14.

§ 34. Authority of owner.—The owner may take control of the vessel from the master at any time and place,[1] or may break up or change the voyage,[2] or may dismiss the master without a cause;[3] but if there is a particular voyage agreed on, he cannot dismiss him without a cause.[4] He may recover from the officers of the vessel the amount paid for damages, and this right is not prejudiced by having compromised.[5] As against a wrong-doer, he is *prima facie* the owner of the goods on board.[6] He is entitled to damages for injury caused by a defect in the

dock, whether caused on Sunday or any other day.[7] A joint owner of hulls in process of construction cannot bind his co-owners for the conversion of them into steam vessels.[8]

1 Woodbury v. Brazier, 48 Me. 302; U. S. v. Haines, 5 Mason, 272; U. S. v. Nye, 2 Curt. 227; U. S. v. Cassedy, 2 Sum. 582.

2 Hoffman v. Yarrington, 1 Low. 171; Pawson v. Donnell, 1 Gill & J. 1; The Elizabeth, 2 Dods. 403: The Atalanta, Bee, 48.

3 Montgomery v. Wharton, 2 Pet. Adm. 397; S. C. Bee, 388.

4 Montgomery v. Henry, 1 Dall. 49; S. C. 1 Am. Dec. 223; Higgins v. Jenks, 3 Ware, 26; The New Draper, 4 C. Rob. 287.

5 Brannan v. Hoel, 15 La. An. 308.

6 Brancker v. Molyneux, 3 Scott, N. R. 332; 3 Man. & G. 84.

7 Sawyer v. Oakman, 1 Low. 134.

8 Secor v. Law, 9 Bosw. 163.

§ 35. **Authority as agent.**—A part owner has a distinct and separate interest, and his power to bind another part owner is a question of authority.[1] He may bind his co-owners for necessary repairs and supplies, but this authority is subject to be controlled, modified, or negatived.[2] He cannot bind his co-owners when they are present without their consent.[3] The question whether one part owner can bind another, in a home port, without authority, is regarded as still an open one.[4] His authority as agent may be inferred from proof of general agency,[5] or may be proved by his acts.[6] He has no authority to mortgage the share of another,[7] nor to procure insurance on it,[8] nor sell the share of another,[9] without special authorization;[10] but he may ratify a sale of his interest when so made.[11] Nor can a part owner sue another part owner at law.[12]

1 Stedman v. Feidler, 25 Barb. 605; McCready v. Woodhull, 34 Barb. 80; Holcroft v. Wilkes, 16 Ind. 373.

2 Elder v. Larrabee, 45 Mo. 590; Patterson v. Chalmers, 7 B. Mon. 595.

3 The Larch, 3 Ware, 28; Mumford v. Nicoll, 20 Johns, 611.

4 The William Thomas v. Ellis, 4 Harring. 309; Benson v. Thompson, 27 Me. 470; Hardy v. Sproule, 31 Me. 71.

5 Munroe v. Holmes, 5 Allen, 201.

6 Merchants' Bank v. State Bank, 10 Wall. 650; Badger v. Bank of Cumberland, 26 Me. 428.

7 Donald v. Hewitt, 33 Ala. 534.

8 Patterson v. Chalmers, 7 B. Mon. 595; Sawyer v. Freeman, 35 Me. 542.

9 The William Bagaley, 5 Wall. 406; Lamb v. Durant, 12 Mass. 54; Jones v. Sims, 6 Port. 138.

10 Henshaw v. Clark, 2 Root, 103.

11 Oviatt v. Sage, 7 Conn. 95; Putnam v. Wise, 1 Hill, 234.

12 Milburn v. Guyther, 8 Gill, 92; The William Thomas v. Ellis, 4 Harring. 309.

§ 36. Majority interests.—Where there are several owners, the majority in interest may control the vessel in every particular, may employ or dismiss the master and crew,[1] but they cannot dismiss the master if he is also part owner, without good cause.[2] They may direct repairs and supplies;[3] may direct employment of vessel,[4] or change the employment,[5] and may compel a surrender of the vessel to them when they desire she should be engaged in commerce.[6] They may bind all the owners in the purchase of the outfit for a fishing voyage.[7] Part owners in possession are authorized to bind the other part owners for proper repairs and necessary outfits,[8] unless expressly provided against.[9]

1 The Marengo, 1 Low, 52; Tunno *v.* The Belsina, 5 Am. Law Reg. 406; Ward *v.* Ruckman, 36 N. Y. 26; Gould *v.* Stanton, 16 Conn. 12; The William Bagaley, 5 Wall. 406.

2 Loring *v.* Illsley, 7 Cal. 24; The See Reuter, 1 Dod. 22; The New Draper, 4 C. Rob. 287. But see The Johan *v.* Siegmund, Edw. Adm. 242.

3 Reven *v.* Lewis, 2 Paine, 202.

4 Gould *v.* Stanton, 16 Conn. 12.

5 Hall *v.* Thing, 23 Me. 461.

6 Southworth *v.* Smith, 27 Conn. 355. And see The Orleans *v.* Phœbus, 10 Peters, 183; Tunns *v.* The Betsina, 5 Am. Law R. 406.

7 Hall *v.* Thing, 23 Me. 461.

8 The Larch, 3 Ware, 31; Mumford *v.* Nicoll, 20 Johns. 611; S. C. 4 Johns. Ch. 522; Doddington *v.* Hallet, 1 Ves. Sr. 497; Ex parte Young, 2 Ves. & B. 242.

9 Brodie *v.* Howard, 17 Com. B. 109; S. C. 33 Eng. L. & E. 146; Wright *v.* Hunter, 1 East, 20; Ex parte Bland, 2 Rose, 93; Bickham *v.* Knight, 5 Scott, 629; Thompson *v.* Finden, 4 Car. & P. 158.

§ 37. Minority rights.—Where there are several part owners, the owners of the lesser shares may compel security to be given, to the amount of their respective shares before the vessel proceeds on her voyage,[1] to double the amount of such shares,[2] but they cannot exact bonds to cover the indebtedness of the vessel, nor to indemnify them against loss in her future employment.[3] If a part owner does not prohibit the voyage, or expressly notify that he would not be responsible for the expenses of the outfit, he will be liable for his proportion of the same,[4] and will be deemed to have consented unless he expressly prohibits the voyage.[5] He is entitled to the possession of the vessel when left by the ship's husband in an unsafe position.[6] He is not entitled to compensation for the use of his part of the vessel during the voyage.[7]

1 Fox *v.* The Lodemia, Crabbe, 271; The Marengo, 1 Low, 52; Christie *v.* Craig, 2 Mer. 137; Gould *v.* Stanton, 16 Conn. 12; Ouston *v.* Hebden, 1 Wils. 101; Haly *v.* Goodson, 2 Mer. 77; The William Bagaley, 5

Wall. 406. And see Matter of Blanchard, 2 Barn. & C. 244; The Apollo, 1 Hagg. Adm. 310.

2 Fox v. The Lodemia, Crabbe, 271; The Marengo, 1 Sprague, 506.

3 The Ocean Belle, 6 Ben. 253.

4 The Marengo, 1 Low, 56; S. C. 1 Sprague, 507; Macy v. De Wolf, 3 Wood. & M. 204; Davis v. Johnston, 4 Sim. 539; Helme v. Smith, 5 Moore & P. 744; 7 Bing. 709; Willings v. Blight, 2 Pet. Adm. 288.

5 Holmes v. Bigelow, 3 Dessus. 497; Christie v. Craig, 2 Mer. 137; Davis v. Johnson, 4 Sim. 539.

6 The Ocean, 1 Sprague, 535.

7 The Marengo, 1 Low, 52; Anonymous, 2 Chan. Cas. 36; Willings v. Blight, 1 Pet. Adm. 288.

§ 38. General liability of owners.—The owners are responsible for all the obligations of the master, *ex contractu*, to the full amount; but for his obligations, *ex delicto*, they are not liable beyond the value of the vessel and freight, or of their interest in the ship and cargo.[1] The fact that a person appears upon the register as owner is not conclusive of his liability for acts done by the master within the scope of his general authority;[2] but from it may be inferred that he employed the person in charge of the vessel.[3] The party who holds himself out as owner of the vessel registered in his name, is responsible as owner, although he may hold the legal title to secure him for money loaned.[4] The real owners are liable, though their names do not appear on the register.[5] Repairs and supplies at the request of the owner are presumed furnished on his personal credit.[6] The presumption is that the vessel is navigated for the benefit of the owners, and at their charge.[7] The owners are liable for all contracts made by the master in the usual course of the business, but not otherwise, unless they assent.[8] Every maritime hypothecation imports a personal liability.[9] An agent employed by the owners of a whale ship to fit her for sea cannot bind the owners by making a negotiable note or accepting a bill of exchange in their names.[10] When two persons are joint owners, and one gives a note in their joint name, the other party being aware of it and making no dissent, he cannot repudiate it after buying out the share of the other.[11] After a ship has been fitted up for a theater, the owners are still liable for the materials furnished.[12] If a charge be made to the ship and owners, they are all liable, whether known or unknown.[13]

See LIENS.

1 The Rebecca, 1 Ware, 188; Stinson v. Wyman, 2 Ware (Dav.) 172; Joy v. Allen, 2 Wood. & M. 318; Porter v. Andrews, 7 Johns. 350; Ramsay v. Allegre, 12 Wheat. 611; Thomas v. Osborn, 19 How. 36. And see Rev. Stats. sec. 4283.

2 Meyers v. Willis, 33 Eng. L. & E. 204; 36 Id. 390; Hackwood v. Lyall, 17 Com. B. 124; Mackenzie v. Pooley, 34 Eng. L. & E. 436; Brass v. Maitland, 26 Ibid. 221.

3 Hibbs v. Ross, Law Rep. 1 Q. B. 534.

4 Tucker v. Buffington, 15 Mass. 479; Starr v. Tucker, 2 Conn. 215; Lord v. Ferguson, 9 N. H. 380; Ex parte Machel, 1 Rose, 447; questioned in Dugan v. Pentz, 2 Hughes, 69. See Webb v. Peirce, 1 Curt. 112, explaining Dry v. Boswell, 1 Camp. 329; Skolfield v. Potter, 2 Ware, 392.

5 The Mary, 1 Mason, 367; Macy v. De Wolf, 2 Wood. & M. 193; Cuyler v. Ferrill, 2 Story, 47; City Bank v. Nantucket S. B. Co. Taney, 60; Hussey v. Allen, 6 Mass. 163; James v. Bixby, 11 Mass. 34; Muldon v. Whitlock, 1 Cow. 290; Cox v. Reid, 1 Car. & P. 602; Thompson v. Finden, 4 Car. & P. 158; Stewart v. Hall, 2 Dow, 29; Reed v. White, 5 Esp. 122; Ex parte Blane, 2 Rose, 91; Baldney v. Ritchie, 1 Stark. 338; Curling v. Robertson, 7 Man. & G. 336; Nostra Signora de los Dolores, 1 Dod. 290; Boucher v. Lawson, Hardw. 85.

6 The Mary Bell, 1 Sawy. 138; Hill v. The Golden Gate, Newb. 306.

7 Blackstock v. Leidy, 19 Pa. St. 335.

8 Mackey v. De Blanc, 12 La. An. 377; Davis v. Marshall, 4 Harring. 84; Nichols v. De Wolf, 1 R. I. 277; City Bank v. Nantucket Steamboat Co. 2 Story, 49; Edwards v. Sherratt, 1 East, 604; Johnstone v. Usborne, 11 Adol. & E. 549; Edwin v. Naumkeag S. C. Co. 1 Cliff. 390; Hewett v. Buck, 17 Me. 147; The Paragon, 1 Ware, 322.

9 Greely v. Smith, 3 Wood. & M. 249; De Sirro v. Bolt, 2 Gall. 462.

10 Taber v. Cannon, 8 Met. 456.

11 Newell v. Nixon, 4 Wall. 572.

12 Franklin v. Pendleton, 3 Sand. 572.

13 Miln v. Spinola, 4 Hill, 177. But see Jones v. Blum, 2 Rich. 475.

§ 39. Liability for advances.—The owners are liable for money advanced to the master in a foreign port; but not unless advanced expressly for the necessary use of the vessel;[1] but in the case of a chartered vessel the burden is on the claimant to show that the advances were on the account of the owner.[2] They are not bound for the subscription of the master to a volunteer displayer of lights in a dangerous locality.[3]

1 Fox v. Holt, 4 Ben. 293; The Harriet, Olcott, 229; Rocher v. Busher, 1 Stark. 27; Thacker v. Moates, 1 Mood. & R. 79.

2 Bass v. O'Brien, 12 Gray, 477.

3 Strong v. Saunders, 15 Mich. 339.

40. Liability for repairs.—The owner, as well as the master, is liable for repairs;[1] not only for necessary repairs, but such as are fit and proper.[2] The party in possession is liable for repairs, and not the mere agent of the owners.[3] Being present when the work is done and giving directions about it is evidence of liability for repairs.[4] Repairs done in joint names create a joint liability.[5] The owner of a chartered vessel is not liable for repairs, if the vessel was warranted to be kept sound during the voyage.[6]

1 Marquand v. Webb, 16 Johns. 96; Webb v. Pierce, 1 Curt. 112; Jennings v. Griffiths, 1 Ryan & M. 42.

2 Webster v. Seekamp, 4 Barn. & Ald. 352.

3 Ohl v. Eagle Ins. Co. 4 Mason, 294; Duncanson v. McLure, 4 Dall. 308, overruling Murgatroyd v. Crawford, 3 Dall. 491. And see Wendover v. Hageboom, 7 Johns. 308; Leonard v. Huntington, 15 Johns. 296; Champlin v. Butler, 18 Johns. 169.

4 Tibbald v. Wood, 1 Fost. & F. 287.

5 Gleadon v. Tinckler, Holt, 586.

6 Campbell v. The Alknomac, Bee, 124.

§ 41. Liability for supplies.—The owners are *prima facie* liable for supplies,[1] subject, however, to rebuttal by evidence of credit having been given to others.[2] Their liability is not affected by the fact that the master purchased in a neighboring port.[3] Whoever supplies a vessel with necessaries has a triple security—the master, the vessel, and the owners;[4] and he is not obliged to inquire whether the person in charge as master or agent is rightfully in possession.[5] Necessity for the supplies may be inferred from the circumstances.[6] They are liable for supplies at the home port unless it be shown that the master had no authority, and that the parties had knowledge of such want of authority;[7] but if one acts against the wishes of the others they are not liable.[8] Newspaper notices not signed are too vague to give notice of want of authority.[9] They are liable for a chronometer if it was reasonably fit and proper, although not part of the apparel and furniture of the vessel.[10] When particular authority is given to the master, the owner is liable for supplies, although the master is owner for the voyage.[11] A part owner, not publicly known as such, is not liable *in personam* for supplies.[12]

1 Macy v. DeWolf, 3 Wood. & M. 200; The Swallow, Olcott, 338; The Nestor, 1 Sum. 73; Cox v. Reid, 1 Car. & P. 602; Halsall v. Griffiths, Ibid. 679; Jennings v. Griffiths, 1 Ryan & M. 42; Rich v. Coe, Cowp. 636; Webb v. Peirce, 1 Curt. 112; Skolfield v. Potter, 2 Ware (Dav.) 396.

2 Cox v. Reid, 1 Car. & P. 602; Jennings v. Griffiths, Ryan & M. 42; Abbott v. Baltimore & R. S. P. Co. 1 Md. Ch. 542; Macy v. D'Wolf, 3 Wood. & M. 200; Post v. Kimberly, 9 Johns. 470.

3 Kenzel v. Kirk, 37 Barb. 113.

4 Rich v. Coe, Cowp. 639; Ex parte Bland, 2 Rose, 91; Zacharie v. Kirk, 14 La. An. 433; Phillips v. Tapper, 2 Pa. St. 323.

5 The Lehigh v. Knox, 12 Mo. 508.

6 Whitten v. Tisdale, 43 Me. 451; Ford v. Crocker, 48 Barb. 142.

7 Prevost v. Patchin, 9 N. Y. 235.

8 King v. Lowry, 20 Barb. 532.

9 Saxton v. Read, Hill & D. 323.

10 Bliss v. Ropes, 9 Allen, 339.

11 Mayo v. Snow, 2 Curt. 102; S. C. 7 Law R. N. S. 496.

12 Dogan v. Peutz, 2 Hughes, 66.

§ 42. Liability for seaman's wages.—The owners, though not named in the shipping articles,[1] are liable for seaman's wages.[2] The party in possession is liable, and not the mere agent of the owners.[3] The owner of a fishing vessel is liable for the wages of the cook.[4]

1 Bronde *v.* Haven, Gilp. 592, distinguishing Hussey *v.* Allen, 6 Mass. 163.

2 Webb *v.* Peirce, 1 Curt. 194; Flaherty *v.* Doane, 1 Low. 149; Harding *v.* Gaither, 12 Cush. 307.

3 Ohl *v.* Eagle Ins. Co. 4 Mason, 394; Wendover *v.* The Hogeboom, 7 Johns. 308; Leonard *v.* Huntington, 15 Johns. 298; Champlin *v.* Butler, 18 Johns. 169; 2 Black, 385; Duncanson *v.* McLure, 4 Dall. 308, overruling Murgatroyd *v.* Crawford, 3 Dall. 491.

4 Harding *v.* Souther, 12 Cush. 307.

§ 43. Liability for negligence.—Owners are liable to co-owners for want of ordinary care in the selection of a master.[1] They are liable to third parties for loss or damage by the fault or neglect of the master,[2] as by neglect to provide tackle, apparel, and furniture required by law,[3] although the whole vessel is chartered, unless the charterer engage the master and crew.[4] The owners are liable for the carelessness or unskillfulness of the master, which, by the common law, nothing but the act of God, or of the common enemy, or of the party complaining, can excuse;[5] for the breaking down of a wharf, when the master was forbidden to discharge there.[6] If the master negligently, and contrary to due course of navigation, drops his anchor and injures a telegraph cable, he is liable.[7] The owners of a steamboat suffering water to be lower than the flue, are liable for resulting damage;[8] also, if they do not employ licensed engineers;[9] they are liable for damage from negligence of the pilot and engineer.[10]

And see CARRIER.

1 Joy *v.* Allen, 2 Wood. & M. 303.

2 The Waldo, 2 Ware, (Dav.) 161; Patton *v.* Magrath, 1 Rice, 162.

3 England *v.* Gripon, 15 La. An. 304.

4 Purvis *v.* Tunno, 1 Brev. 259; S. C. 2 Amer. Dec. 664.

5 Dusar *v.* Murgatroyd, 1 Wash. C. C. 13; The Niagara *v.* Cordes, 21 How. 7; Stone *v.* Ketland, 1 Wash. C. C. 142; Brown *v.* The D. S. Cage, 1 Woods, 401.

6 Vose *v.* Allen, 3 Blatchf. 289. And see The Ottowa, 1 Brown Adm. 356; The Empire State, Newb. 541.

7 Submarine Tel. Co. *v.* Dickson, 15 Com. B. N. S. 759.

8 McMahon *v.* Davidson, 12 Minn. 357.

9 McMahon *v.* Davidson, 12 Minn. 357.

10 Sherlock *v.* Alling, 93 U. S. 99.

§ 44. Liability for misconduct of master and crew.—The owners are liable for the misconduct of the master to third persons,[1] for the conduct of the master and crew on the execution of the business on which they are engaged, but not if the master exceeds his authority or violates orders.[2] The owners of a privateer are liable for injury done by master and crew, but not for a piratical or unauthorized seizure and spoliation.[3] The owners of a vessel engaged in salvage services are liable for the misfeasance of the master and crew, and for negligence in the performance of their duties.[4] They are liable for the torts of the master,[5] as in shipping a minor, a fugitive from another vessel.[6] They are liable for the willful and malicious acts of the master done in the course and scope of his employment, but not for crimes so committed;[7] for damages by collision, though the ship was in charge of a pilot at the time.[8]

1 Joy *v.* Allen, 2 Wood. & M. 303.

2 Dias *v.* The Revenge, 3 Wash. 262; Ralston *v.* The State Rights, Crabbe, 22; Sunday *v.* Gordon, Blatchf. & H. 569; McGuire *v.* The Golden Gate, McAll. 104.

3 Dias *v.* The Revenge, 3 Wash. 262; L'Invincible, 1 Wheat. 238; The Anna Maria, 2 Wheat. 327; The Amiable Nancy, 1 Paine, 111; S. C. 3 Wheat. 546; Talbot *v.* Three Briggs, 1 Dall. 95; Del Col. *v.* Arnold, 3 Dall. 333; S. C. Bee, 5; Gibbs *v.* Two Friends, Bee, 416; San Juan Baptista, 5 C. Rob. 33; The Karasan, Ibid. 291; Die Fire Damer, Ibid. 357. And see PRIZE.

4 Dias *v.* The Revenge, 3 Wash. C. C. 262; The Mullhouse 12 Law Rep. N. S. 276; The Amiable Nancy, 3 Wheat. 546; Nostra Signora de los Dolores, 1 Dod. 290; The Dundee, 1 Hagg. Adm. 109. And see SALVAGE.

5 Dean *v.* Angus, Bee, 369; Ralston *v.* The State Rights, Crabbe, 45; Dias *v.* The Revenge, 3 Wash. C. C. 262; McGuire *v.* The Golden Gate, McAll. 106.

6 Sherwood *v.* Hall, 3 Sum. 127.

7 Andrews *v.* Essex F. & M. Ins. Co. 3 Mason, 26; Coffin *v.* The Newburyport, Mar. Ins. Co. 9 Mass. 446; Ralston *v.* The State Rights, Crabbe, 22; Hazard *v.* Israel, 1 Binn. 241; McMahon *v.* Davidson, 12 Minn. 357; Lyons *v.* Martin, 8 Adol. & E. 512; McManus *v.* Crickett, 1 East, 106; Anonymous, 1 Ld. Raym. 739; Jones *v.* Hart, 2 Salk. 441; Middleton *v.* Fowler, 1 Salk. 282; Quarman *v.* Burnett, 6 Mees. & W. 499; Bowcher *v.* Nordstrom, 1 Taunt. 568.

8 Bussy *v.* Donaldson, 4 Dall. 206. And see COLLISION.

§ 45. Limitation of liability of owners.—The act of Congress limiting the liability of ship-owners is not retrospective;[1] it applies to torts alone, and does not apply to breach of contract arising from unseaworthiness of the vessel;[2] it applies to injuries of the person as well as to property;[3] to loss by fire,[4] to embezzlement, loss, damage, or injury incurred, occasioned, or done without their privity. to the amount of their interest in the vessel.[5] In

cases of collision, the time of the valuation is just before the tort, and it is not lessened by the ship being under mortgage.[9] The owners are not liable for the barratry of the master and crew, beyond the sum mentioned in the charter party.[7] The act does not apply to vessels navigating the upper waters of the Mississippi.[8] The provisions of the act are applicable to vessels running from port to port in the same State, carrying merchandise and passengers destined to foreign States.[9] The word "privity" means some fault or neglect in which the owner of the vessel personally participates; and "knowledge" means some personal cognizance.[10] The exception in the statute as to canal-boats, barges, and lighters does not include vessels used on the great lakes.[11] Their liability may be discharged by surrendering and assigning the vessel and freight to trustees for the benefit of the parties injured, and if the vessel be totally lost, the owners are discharged.[12].

1 Kelley *v.* Kelso, 5 Ohio St. 198. See Rev. Stat. sec. 4283.

2 Matter of Sinclair, 8 Am. Law Reg. 206; Naylor *v.* Baltzell, Taney, 55; Sutton *v.* Mitchell, 1 Term Rep. 18.

3 The Epsilon, 6 Ben. 378.

4 Walker *v.* Transportation Co. 3 Wall. 150; Matter of Prov. & N. Y. S. S. Co. 6 Ben. 124; Moore *v.* American Transp. Co. 24 How. 1.

5 Moore *v.* American Transp. Co. 24 How. 1; The Epsilon, 6 Ben. 378; Norwich Co. *v.* Wright, 13 Wall. 104; Allen *v.* Mackay, 1 Sprague, 219; The City of Norwich, 1 Ben. 89; Schleffelin *v.* Harvey, 6 Johns. 170; The Niagara *v.* Cordes, 21 How. 26; U. S. *v.* The Mollie, 2 Woods, 318; The Harrison, 2 Abb. U. S. 89; The Rebecca, 1 Ware, 188.

6 Walker *v.* Boston Ins. Co. 14 Gray, 288; Spring *v.* Haskell, 14 Gray, 309. See COLLISION.

7 Campbell *v.* The Alknomac, Bee, 124; Stinson *v.* Wyman, 2 Ware (Dav.) 172.

8 The War Eagle, 6 Biss. 364. And see Moore *v.* American Transp. Co. 24 How. 1.

9 Lord *v.* Goodall, N. & P. S. S. Co. 4 Sawy. 292.

10 Lord *v.* Goodall, N. & P. S. S. Co. 4 Sawy. 292.

11 Moore *v.* American Transp. Co. 24 How. 1.

12 Norwich Co. *v.* Wright, 13 Wall. 118; Cannan *v.* Meaburn, 12 Bing. 243, distinguished.

§ 46. When not liable.—A ship-owner is not liable personally for work done, unless done by his order or upon his credit.[1] The general owners are not liable when the vessel is in the employ of a charterer,[2] unless the supplies were ordered by them,[3] nor for wharfage.[4] The general owners are not liable when the vessel is let to the master on shares, he to victual, man her, etc. In such case the master alone is responsible for supplies.[5] So the owners of a steamboat are not liable if the steward was

under contract to board the officers and crew at a certain price.[6] They are not liable if special credit was given to one of their number.[7] Their liability is discharged by giving a note of a part owner which was accepted.[8] The general owners are not liable for supplies if they were furnished on the personal credit of the master,[9] but the presumption of law is that they were furnished on their credit.[10] Where the supplies were not necessary, the master had no authority to pledge the credit of the owners;[11] so with regard to superfluities and luxuries.[12] When the carriage of money is a perquisite of the master, the owners will not be liable as a common carrier.[13] So in case of embezzlement of goods when the master took the freight and commissions to himself.[14] The owner of a mere legal title is not liable for debts contracted by the master.[15] The relation between the master and the owners is not such that they become liable as acceptors of a bill of exchange drawn on them for supplies.[16] They are not liable for the acts of a pilot not selected by them, but received in obligation to a requisition of law.[17]

1 Hippard v. The Cadwalader, 6 Pa. L. J. 473; Leonard v. Huntington, 15 Johns. 302; Jennings v. Griffiths, Ryan & M. 42.

2 Perry v. Osborne, 5 Pick. 422.

3 Webb v. Peirce, 1 Curt. 104, reversing S. C. 1 Sprague, 192; Urann v. Fletcher, 1 Gray, 125; Baker v. Huckins, 5 Gray, 536; Thompson v. Snow, 4 Greenl. 264; Cutler v. Thurlo, 20 Me. 213; Williams v. Williams, 23 Me. 17; Sproat v. Donnell, 26 Me. 185; Houston v. Darling, 16 Me. 413; Leonard v. Huntington, 15 Johns. 298; Reynolds v. Toppan, 15 Mass. 370; Taggard v. Loring, 16 Mass. 336; Manter v. Holmes, 10 Met. 402; Perry v. Osborne, 5 Pick. 422; Cutler v. Winson, 6 Pick. 335; Thompson v. Hamilton, 12 Pick. 425; Frazer v. Marsh, 13 East, 238; Reeve v. Davis, 1 Adol. & E. 312.

4 Philadelphia v. Naglee, 1 Ashm. 37.

5 Webb v. Peirce, 1 Curt. 107; Skolfield v. Potter, 2 Ware (Dav.) 395; and see The Nathaniel Hooper, 3 Sum. 575; Sproat v. Donnell, 26 Me. 185; Cutler v. Winsor, 6 Pick. 335; Tucker v. Stinson, 12 Gray, 487; Cutler v. Thurlo, 20 Me. 313; The H. B. Foster, 3 Ware, 165; Taggard v. Loring, 16 Mass. 336; Emery v. Hersey, 4 Me. 407; Manter v. Holmes, 10 Met. 402; Perry v. Osborne, 5 Pick. 422; Thompson v. Hamilton, 12 Pick. 428; Thompson v. Snow, 4 Me. 264; The Horace E. Bell, 3 Ware, 237; The Bowditch, 3 Ware, 73; Fox v. Holt, 4 Barn. 290; Mayo v. Snow, 2 Curt. 102; Flaherty v. Doane, 1 Low. 140; Dry v. Boswell, 1 Curt. 329; Winsor v. Cutts, 7 Me. 261.

6 Ernst v. The Brooklyn, 22 Wis. 649.

7 Macy v. De Wolf, 3 Wood. & M. 200; Curling v. Robertson, 7 Man. & G. 336; Jennings v. Griffiths, Ryan & M. 42; Leef v. Goodwin, Taney, 460; James v. Bixby, 11 Mass. 34.

8 French v. Price, 24 Pick. 13.

9 The Fortitude, 3 Sum. 228; United Ins. Co. v. Scott, 1 Johns. 106; Wainwright v. Crawford, 3 Yeates, 131; 4 Dall. 225; Philips v. Ledley, 1 Wash. C. C. 226; James v. Bixby, 11 Mass. 34; Glading v. George, 3 Grant, 290; Merwin v. Shaller, 16 Conn. 489; Leddo v. Hughes, 15 Ill. 41.

10 Glading v. George, 3 Grant, 290.

11 Organ *v.* Brodie, 10 Exch. 449; Burquin *v.* Flinn, 1 McCord, 316.

12 Pratt *v.* Tunno, 2 Brev. 449.

13 Citizens' Bank *v.* Nantucket S. Co. 2 Story, 49; Allen *v.* Sewall, 2 Wend. 327; S. C. 6 Ibid. 325; Edwards *v.* Sherrett, 1 East, 604. And see Shelden *v.* Robinson, 7 N. H. 157.

14 King *v.* Lenox, 19 Johns. 235.

15 Duff *v.* Bayard, 4 Watts & S. 240; Jones *v.* Blum, 2 Rich. 475.

16 Bowen *v.* Stoddard, 10 Met. 375.

17 The Carolus, 2 Curt. 71; The Agricola, 2 W. Rob. 10.

§ 47. Rights and liabilities of part owners.—If a part owner takes any part in the voyage he must bear his proportion of the expenses, and is entitled to his share of the profits.[1] He is not chargeable with bills on account of the vessel before his ownership commenced,[2] nor for supplies after he has parted with his interest.[3] Where a vessel owned by several is sailed by one for their joint benefit, all are liable for advances for necessary expenses; and if they employ a joint agent, they are liable in the aggregate.[4] A part owner is liable for his share of a reasonable commission charged by the agent.[5] A part owner dissenting from the employment of the vessel is not liable to third parties having notice of such dissent.[6] The dissent must be notified before the vessel has been repaired and fitted for the voyage.[7] A part owner is not liable to another part owner for repairs made at the home port of the vessel without his consent.[8] Part owners are not liable for damages caused by fire through negligence of the master.[9] In general, all part owners are liable *in solido* for repairs and for necessaries actually supplied.[10] A part owner in possession may bind the other part owner for proper repairs and necessary outfit for the voyage, but this applies only to personal liability.[11]

1 Gould *v.* Stanton, 16 Conn. 12.

2 Higgins *v.* Packard, 2 Hall, 248; Scottin *v.* Stanley, 1 Dall. 129; Rennell *v.* Kimball, 5 Allen, 356; Richardson *v.* Kimball, 28 Me. 468.

3 Dame *v.* Hadlock, 4 Pick. 458; Hussey *v.* Allen, 6 Mass. 163; Thorne *v.* Hicks, 7 Cowen, 697; Leonard *v.* Huntington, 15 Johns. 298; Jones *v.* Pitcher, 3 Stewt. & P. 135.

4 Pasmore *v.* Bousfield, 1 Stark. 296; Basset *v.* Crowell, 3 Rob. (N. Y.) 72.

5 Rennell *v.* Kimball, 5 Allen, 356.

6 Stedman *v.* Feidler, 25 Barb. 605; The William Bagaley, 5 Wall. 406.

7 The Marengo, 1 Low. 56; Davis *v.* Johnson, 4 Sim. 539; Willings *v.* Blight, 2 Pet. Adm. 288.

8 Hardy *v.* Sproule, 31 Me. 71; The Larch, 3 Ware, 31.

9 Keene *v.* Whistler, 2 Sawy. 348.

10 Gallatin *v.* Pilot, 2 Wall. Jr. 572; Macy *v.* DeWolf, 3 Wood & M. 193; Muldon *v.* Whitlock, 1 Cowen, 290; Schemerhorn *v.* Loines, 7 Johns

311; Hardy v. Sprowle, 29 Me. 258; Chapman v. Durant, 10 Mass. 47; Thompson v. Furden, 4 Car. & P. 158; Wright v. Hunter, 1 East, 20; Westerdell v. Dale, 7 Term. Rep. 306; Baldney v. Ritchie, 1 Stark. 338.

11 The Larch, 3 Ware, 31; Doddington v. Hallet, 1 Ves. Jr. 497; Ex parte Young, 2 Ves. & B. 242; Mumford v. Nicoll, 20 Johns. 611; S. C. 1 Johns. Ch. 52; Ex parte Harrison, 2 Rose, 76.

§ 48. Lien of part owners.—When two persons build a ship together, and one advances more than his proportion of the cost, he has no lien on the vessel for the balance due him,[1] nor has a part owner a lien on the shares of other part owners for his advances for outfits and supplies of the vessel,[2] nor on the vessel or the proceeds thereof,[3] nor for a general balance of accounts.[4] He cannot take from the master a bottomry bond on the share of another part owner,[5] but if he be a copartner he may have a lien.[6]

1 Merrill v. Bartlett, 6 Pick. 46.

2 Mumford v. Nicoll, 20 Johns. 611; Braden v. Gardner, 4 Pick. 456; The Larch, 2 Curt. 427; Macy v. De Wolf, 3 Wood. & M. 205; Helme v. Smith, 7 Bing. 709; Smith v. De Silva, Cowp. 469; Snell v. Silcock, 5 Ves. Jr. 469; Green v. Briggs, 6 Hare, 395; Ex parte Harrison, 2 Rose, 76; 3 Ware, 31; Ex parte Young, 2 Ves. & B. 242.

3 The Larch, 2 Curt. 427; Macy v. De Wolf, 3 Wood. & M. 205; Ex parte Young, 2 Ves. & B. 242; 2 Rose, 178; Smith v. De Silva, Cowp. 469.

4 Patton v. The Randolph, Gilp. 457; Braden v. Gardner, 4 Pick. 456.

5 The Ocean Belle, 6 Ben. 253; Patton v. The Randolph, Gilp. 457.

6 The Larch, 2 Curt. 434; Mumford v. Nicoll, 20 Johns. 611; Patton v. The Randolph, Gilp. 457; Lamb v. Durant, 12 Mass. 54; Merrill v. Bartlett, 6 Pick. 46; French v. Price, 24 Pick. 13; Braden v. Gardner, 4 Pick. 456.

§ 49. Actions between part owners.—An action lies by one part owner against another for the destruction of the vessel by negligence,[1] but trover does not lie between part owners for merely a dispossession of property,[2] nor replevin.[3] Before a part owner can maintain a suit for his share of the net avails, an adjustment must be had among them all, relative to the earnings and disbursements,[4] and the wages of the master and seamen and costs of insurance are properly deducted from the gross freight on settlement.[5] A part owner who has received the earnings, disbursed money for repairs, etc., is liable as receiver, to account for the net earnings, in an action for an accounting.[6] A part owner is not precluded from libeling the vessel for wages,[7] but he cannot sue for services as clerk.[8] He cannot sue for services without notice, under the statutes of Missouri.[9] When part owners, separately, authorize an agent to sell the vessel, each may sue for his share of the money.[10] Part owners may proceed in equity for an accounting and settlement; admiralty has no jurisdiction in such cases.[11]

1 Lowthorp v. Smith, 1 Hayw. 255. But see Moody v. Buck, 1 Sand. 304; The Lady of the Lake, 3 Law Rep. Ad. & E. 29.

2 Hyde v. Stone, 9 Cowen, 230; Merserean v. Norton, 15 Johns. 179; Hurd v. Darling, 14 Vt. 214; Seldon v. Hickock, 2 Caines, 166; Fennings v. Grenville, 1 Taunt. 241.

3 Barnes v. Bartlett, 21 Pick. 401; Furlong v. Bartlett, Ibid.

4 Dodge v. Hooper, 35 Me. 536; Wood v. Merritt, 2 Bosw. 368.

5 Lindsay v. Gibbs, 3 De Gex & J. 690.

6 Jarvis v. Noyes, 45 Me. 106.

7 Foster v. The Pilot No. 2, 5 Pa. L. J. 231.

8 Hinton v. Law, 10 Mo. 701.

9 The Raritan v. McCloy, 10 Mo. 534.

10 Millburn v. Guyther, 8 Gill, 92.

11 Moffat v. Farquharson, 2 Brown Ch. 338; Good v. Blewitt, 13 Ves. Jr. 397; Steamer Orleans v. The Phœbus, 11 Peters, 175; Grant v. Poillon, 20 How. 162; Kellum v. Emerson, 2 Curt. 79; Minturn v. Maynard, 17 How. 477; Ward v. Thompson, 22 How. 330; The Apollo, 1 Hagg. Adm. 306.

§ 50. Owner for the voyage.—The master,[1] or any third person, may be the special owner of the vessel.[2] The ownership for the voyage may be created by charter party.[3] Where the master chartered the vessel at a fixed proportion of profits, and the fact was known to persons signing articles, or where no articles were signed, but the seamen looked to the master for their wages, the owners were not bound for their wages.[4] A part owner sailing a vessel on shares, and paying all costs and expenses of her navigation, is an owner *pro hac vice*.[5] Where the owner employs, pays, and supports the master and crew, retains control, and is answerable for the conduct of the master, he is owner for the voyage, notwithstanding the charter party.[6] One-third owner of a vessel worked by the two-thirds owner, who took uncontrolled management of her, is not liable for damage caused by negligence of such two-thirds owner.[7] When a vessel is navigated under the entire control and for the exclusive benefit of a third person, such person, *pro hac vice*, is the owner and liable for supplies,[8] and repairs,[9] and as carrier.[10] The implied authority of the owner for the voyage does not arise in reference to a bill of lading for property not shipped, so as to bind the general owner.[11]

See CHARTER PARTY.

1 Mayo v. Snow, 2 Curt. 105; Houston v. Darling, 16 Me. 413.

2 Webb v. Peirce, 1 Curt. 107; Skolfield v. Potter, 2 Ware, 395; Reeve v. Davis, 1 Adol. & E. 312.

3 Oliver v. Greene, 3 Miss. 133; Ohl v. Eagle Ins. Co. 4 Mason, 393; Sproat v. Donnell, 26 Me. 185; Thorp v. Hammond, 12 Wall. 408; Reed v. U. S. 11 Wall. 491; Sherman v. Fream, 30 Barb. 478; Mott v. Ruckman, 3 Blatchf. 73; Fraser v. Marsh; Reeve v. Davis, 1 Adol. & E. 312;

Perry v. Osborne, 5 Pick. 422; Cutler v. Winsor, 6 Pick. 335; Thompson v. Hamilton, 12 Pick. 428; Manter v. Holmes, 10 Met. 402.

4 Packard v. The Louisa, 2 Wood. & M. 48; S. C. 9 Law Rep. 441. Matter of McLellan, 6 Law Rep. 440.

5 Thorp v. Hammond, 12 Wall. 408.

6 Palmer v. Gracie, 4 Wash. C. C. 110; The Nathaniel Hooper, 3 Sum. 542; S. C. 2 Law Rep. 133; Arthur v. The Cassius, 2 Story, 81; The Swallow, Olcott, 338; The Batavia, 2 Dods. 500.

7 Bernard v. Aaron, 11 Com. B. N. S. 889.

8 Jones v. Blum, 2 Rich. 475; Webb v. Peirce, 1 Curt. 104; 5 Law Rep. N. S. 9; Mayo v. Snow, 2 Curt. 102; 7 Law Rep. N. S. 496; Fox v. Holt, 36 Conn. 556; Houston v. Darling, 16 Me. 413. And see Rev. Statz. sec. 4286.

9 Tyler v. Holmes, 38 Me. 258; Nash v. Parker, Ibid. 489; Decker v. Furniss, 3 Duer, 291; Lincoln v. Wright, 23 Pa. St. 76.

10 Tuckerman v. Brown, 17 Barb. 191; Baker v. Huckins, 5 Gray, 598.

11 Freeman v. Buckingham, 18 How. 182.

§ 51. Managing owners.—The managing owner of a vessel represents the interests of all the owners, and has the same power which the majority in interest have;[1] his power to make repairs is implied;[2] an authority to make repairs cannot be revoked after it has been acted on.[3] He may act as broker in collecting and distributing freight.[4] He may bind the owners for outfit, care, and employment of the vessel, but he cannot purchase a cargo without special authority.[5] He has power to release the vessel from arrest by procuring bail for damages and costs.[6] Where the master is part owner, with entire control, he may sue in his own name.[7] He is presumed to have no right to compensation for his own services.[8] He is entitled to charge only the cost price of supplies furnished by him,[9] and to interest on the amount paid by him in excess of the amount received for disbursements.[10] The title to the cargo may vest in a managing owner.[11] An agreement between owners that the vessel shall be managed by a part owner, who was to receive a commission on all disbursements, constitutes him managing owner, and his acts are considered the acts of all the owners, who are liable on all contracts made for the conduct of the common concern.[12]

1 Hall v. Thing, 23 Me. 461.

2 Revens v. Lewis, 2 Paine, 202.

3 Chappell v. Bray, 6 Hurl. & N. 145.

4 Smith v. Lay, 3 Kay & J. 105; Miller v. Mackay, 31 Beav. 77; Owston v. Ogle, 13 East, 538.

5 Hewett v. Buck, 18 Me. 147.

6 Barker v. Highley, 15 Com. B. N. S. 27.

7 Cawthron v. Trickett, 15 Com. B. N. S. 754.

8 Bennell *v.* Kimball, 5 Allen, 205; Smith *v.* Lay, 3 Kay & J. 495; Benson *v.* Heathorn, 1 Younge & C. 326.

9 Ritchie *v.* Couper, 28 Beav. 344.

10 Bennell *v.* Kimball, 5 Allen, 205.

11 Macy *v.* DeWolf, 2 Wood. & M. 209; Mumford *v.* Nicell, 20 Johns. 611.

12 Darby *v.* Baines, 9 Hare, 369; S. C. 12 Eng. L. & Eq. 238.

§ 52. Ship's husband.—The duties of a ship's husband are to see to the proper outfit of the vessel, to repairs, and tackle, and furniture, and to have a proper master and crew, necessary to seaworthiness.[1] He has no authority to make an assignment of the whole freight to secure money advanced to him,[2] nor to insure,[3] nor purchase a cargo,[4] without special authority;[5] but if he makes insurance, the parties benefited may ratify his acts.[6] He cannot bind the owners by accepting a bill of exchange in their name,[7] nor can he bind them for the expenses of a legal prosecution.[8] The authority of a ship's husband is revoked by the death of the owner, whose estate is not thereafter chargeable.[9] If a ship's husband be part owner, each of the owners is liable for his share of advances for the outfit;[10] if he be not part owner, all the owners are liable to him *in solido*,[11] and he has a lien on the vessel for expenses insured in its outfit.[12] Ship's husbands are personally liable on their note given in the firm name where there was nothing on the face of the note to indicate that they were co-owners.[13]

1 Turner *v.* Burrows, 8 Wend. 144; Gould *v.* Stanton, 16 Conn. 12; Sims *v.* Brittain, 4 Barn. & Adol. 375; Owston *v.* Ogle, 13 East, 538; Benson *v.* Heathorn, 1 Younge & C. Ch. 326.

2 Guion *v.* Trask, 1 De Gex, F. & J. 373.

3 Turner *v.* Burrows, 5 Wend. 541; S. C. 8 Wend. 144; Patterson *v.* Chalmers, 7 B. Mon. 595; Foster *v.* U. S. Ins. Co. 11 Pick. 85; Robinson *v.* Gleadow, 2 Bing. N. C. 156; French *v.* Backhouse, 5 Burr. 2727; Bell *v.* Humphries, 2 Stark. 345.

4 Hewitt *v.* Buck, 17 Me. 147.

5 Hewitt *v.* Buck, 17 Me. 147; Turner *v.* Burrows, 5 Wend. 541; 8 Wend. 144; Patterson *v.* Chalmers, 7 B. Mon. 595.

6 Hagedorn *v.* Oliverson, 2 Maule & S. 485; Routh *v.* Thompson, 13 East, 274.

7 Taber *v.* Cannon, 8 Met. 456.

8 Campbell *v.* Stein, 6 Dow, 116.

9 Stedman *v.* Feidler, 20 N. Y. 437.

10 Helme *v.* Smith, 7 Bing. 709; Brown *v.* Tapscott, 6 Mees. & W. 119.

11 Brown *v.* Tapscott, 6 Mees. & W. 119.

12 Gould *v.* Stanton, 16 Conn. 12; Macy *v.* De Wolf, 3 Wood. & M. 193; Holderness *v.* Shackels, 8 Barn. & C. 612. But see The Larch, 2 Curt. 433; Ex parte Young, 2 Ves. & B. 242; Smith *v.* De Silva, Cowp. 469; Mendell *v.* Bonney, 5 Allen, 205.

13 Snelling *v.* Howard, 7 Rob. N. Y. 400.

Vinal v. Burrill, 16 Pick. 401. And see Ohl v. Eagle Ins. Co. 4 Mason, 393.

2 Richardson v. Kimball, 28 Me. 463.

3 Richardson v. Kimball, 28 Me. 463.

4 De Herrara v. The Acme, 7 Int. Rev. Rec. 149; The Fideliter, Deady, 645.

5 Winsor v. McLellan, 2 Story, 492.

6 Addis v. Baker, 1 Anst. 222; Gillespy v. Couts, Amb. 652.

7 Gibson v. Stevens, 3 McLean, 563; Atkinson v. Maling, 2 Term Rep. 462.

8 U. S. v. Willing, 4 Cranch, 48; Hatch v. Smith, 5 Mass. 42.

9 U. S. v. Willing, 4 Cranch, 48; Hatch v. Smith, 5 Mass. 42.

10 Ohl v. The Eagle Ins. Co. 4 Mason, 393; Ex parte Halkett, 19 Ves. Jr. 474; 3 Ves. & B. 135; Sutton v. Buck, 2 Taunt. 302; Atkinson v. Maling, 2 Term Rep. 462; Gibson v. Stevens, 8 How. 399; Leland v. The Medora, 2 Wood. & M. 47; Weston v. Penniman, 1 Mason, 306.

§ 54. Sale by builder.—If the purchaser designate the material of which the vessel is to be built, the builder is not liable for any loss or damage which may result from the imperfection of, or natural defects in, that material;[1] but if a ship is ordered for a particular purpose, there is an implied warranty of fitness for that purpose.[2] A contract providing that a vessel be built, finished, and ready for the rigger, and be launched and delivered on a certain day, places the builder under the obligation to have the vessel ready for the rigger long enough before the launching to enable him to complete his work.[3]

1 Cunningham v. Hall, 4 Allen, 268; 1 Sprague, 404.

2 Chambers v. Crawford, Addis. 150; Shepherd v. Pybus, 3 Man. & G. 868.

3 Rennell v. Kimball, 5 Allen, 356.

§ 55. Sale of ship at sea.—A ship at sea may be sold or mortgaged.[1] It may be transferred by delivery of a bill of sale.[2] The transfer is valid without delivery if possession is taken within a reasonable time after coming within reach of the purchaser.[3] Third persons cannot raise the question whether the sale was in fraud of creditors.[4] The principles which apply to the sale of a ship at sea, apply also to the sale of a cargo.[5] The sale of a ship at sea forfeits her national character unless the new owner pursues all the requisites of the law to obtain a new registry.[6] The sale of a vessel and cargo abroad at the time, by a *bona fide* bill of sale, is valid against vendor's creditors, if the vendee takes possession thereof on her arrival or without delay.[7] Title to a vessel at sea passes by assignment.[8]

1 Crapo v. Kelly, 16 Wall. 640, citing Tucker v. Buffington, 15 Mass. 477; Putnam v. Dutch, 8 Mass. 287; Badlam v. Tucker, 1 Pick. 389; Gard-

ner *v.* Harland, 2 Pick. 599; Joy *v.* Sears, 9 Pick. 4; Turner *v.* Coolidge, 2 Met. 350; Winsor *v.* McLellan, 2 Story, 492; Brimley *v.* Spring, 7 Mc. 241; Wheeler *v.* Sumner, 4 Mason, 183; Morgan *v.* Biddle, 1 Yeates, 3.

2 Gibson *v.* Stevens, 8 How. 399; Crapo *v.* Kelly, 16 Wall. 640; Leland *v.* The Medora, 2 Wood. & M. 117; Gardner *v.* Howland, 2 Pick. 599; Conard *v.* Atlantic Ins. Co. 1 Peters, 386; Ohl *v.* Eagle Ins. Co. 4 Mason, 393; Brown *v.* Heathcote, 1 Atk. 160; Greaves *v.* Hepke, 2 Barn. & Ald. 131; Ex parte Halkett, 19 Ves. Jr. 474; S. C. 3 Ves. & B. 135; Atkinson *v.* Maling, 2 Term Rep. 462; Wilkes *v.* Ferris, 5 Johns. 335; Pleasants *v.* Pendleton, 6 Rand. 473; Ingraham *v.* Wheeler, 6 Conn. 277.

3 Turner *v.* Coolidge, 2 Met. 350; Wheeler *v.* Sumner, 4 Mason, 183; 2 Wood. & M. 117.

4 The Lion, 1 Sprague, 40.

5 Conard *v.* Atlantic Ins. Co. 1 Peters, 389; D'Wolf *v.* Harris, 4 Mason, 515; Gardner *v.* Howland, 2 Pick. 599; Gallop *v.* Newman, 7 Pick. 282; Pratt *v.* Parkman, 24 Pick. 42.

6 Davidson *v.* Gorham, 6 Cal. 343; The Martha Washington, 15 Law Rep. N. S. 22; U. S. *v.* Willing, 4 Cranch, 48.

7 Portland Bank *v.* Stacy, 4 Mass. 661; S. C. 3 Am. Dec. 253; Portland Bank *v.* Stubbs, 6 Mass. 422; S. C. 4 Am. Dec. 151.

8 Crapo *v.* Kelly, 16 Wall. 629; Thuret *v.* Jenkins, 7 Mart. 318.

§ 56. Appurtenances.—The word "appurtenances" must not be construed with reference to the abstract, naked idea of a ship—the relation borne to the actual service of the vessel must be considered.[1] Whatever is on board the vessel for the object of the voyage or adventure, belonging to the owners, is a part of the vessel and her appurtenances.[2] A rudder and cordage, purchased by the ship, are a part thereof.[3] Materials fitted to and forming a part of the vessel are appurtenances.[4] Sails and rigging, though detached according to the custom of the port, are appurtenances;[5] so, fishing stores, of vessels engaged in the whale fisheries,[6] and provisions,[7] but the cargo of a whaling vessel does not pass as appurtenance.[8] So, a new ash-pan procured for the boiler passes as appurtenant.[9] Ballast is not included as appurtenant to the vessel,[10] nor boats.[11] A chronometer, belonging to the owner, and on board at the time of sale, may be a necessary appurtenance.[12]

1 The Dundee, 1 Hagg. Adm. 109; Gale *v.* Laurie, 5 Barn. & C. 156.

2 Gale *v.* Laurie, 5 Barn. & C. 164.

3 Woods *v.* Russell, 5 Barn. & Ald. 942; Goss *v.* Quinton, 3 Man. & G. 825.

4 Wood *v.* Bell, 6 Ellis & B. 355; 36 Eng L. & E. 148; Baker *v.* Gray, 17 Com. B. 462; 34 Eng. L. & E. 387.

5 The Alexander, 1 Dods. 278.

6 The Dundee, 1 Hagg. Adm. 109; Hoskins *v.* Pickersgill, 3 Doug. 222.

7 Brough *v.* Whitmore, 4 Term Rep. 206.

8 Langton *v.* Horton, 8 Beav. 9.

9 Newberry *v.* The Fashion, Newb. 67.

10 Kynter's Case, 1 Leon. 46; Lano v. Neale, 2 Stark. 105; Burchard v. Tapscott, 3 Duer, 363.

11 Starr v. Goodwin, 2 Root, 71. But see Briggs v. Strange, 17 Mass. 405; Hall v. Ocean Ins. Co. 21 Pick. 472; Shannon v. Owen, 1 Man. & R. 392.

12 Richardson v. Clark, 15 Me. 421.

§ 57. Bill of sale of vessel.—A bill of sale of a vessel is a good and valid conveyance,[1] and is conclusive as between the parties,[2] and as against a prior pledgee in the absence of delivery of possession.[3] To constitute a good title in law, the transfer must have been made in good faith and for value. It is only *prima facie* evidence of title,[4] and may be proved by parol to have been intended as a mortgage.[5] An absolute bill of sale, unless accompanied by possession, is void as to creditors and *bona fide* purchasers.[6] Although a bill of sale expresses a certain consideration, the vendor may prove an oral agreement to receive an additional sum;[7] but third parties cannot avail themselves of a collateral agreement defeasable on certain conditions to defeat title of vendee.[8] A bill of sale of one-half a vessel as collateral security, allowing vendors to retain possession until default in payment, is an immediate conditional sale.[9]

1 The Henry, Blatchf. & H. 477; Ohl v. Eagle Ins. Co. 4 Mason, 390; The Sisters, 5 C. Rob. 138; The Tilton, 5 Mason, 465; Lord v. Ferguson, 9 N. H. 380; Interests to be named in, Rev. Stats. sec. 4196.

2 Ohl v. Eagle Ins. Co. 4 Mason, 394; Robinson v. McDonnell, 2 Barn. & Ald. 134.

3 Bonsey v. Amee, 8 Pick. 236.

4 Hozey v. Buchanan, 16 Peters, 215.

5 Morgan v. Shinn, 15 Wall. 105; The Innisfallen, Law Rep. 1 Ad. & E. 72.

6 Hamilton v. Russell, 1 Cranch, 309; D'Wolf v. Harris, 4 Mason, 515, The Romp, Olcott, 196; Washington v. Wilson, 2 Cranch C. C. 153; The Perseverance, Blatchf. & H. 385; Gardner v. Howland, 2 Pick. 599; The City of Norwich, 1 Ben. 103.

7 Clark v. Deshon, 12 Cush. 589.

8 The Ocean, 1 Sprague, 535.

9 Winsor v. McLellan, 2 Story, 492; S. C. 6 Law Rep. 440.

§ 58. Recitals in bill of sale.—The act of Congress which requires the registry to be inserted in the bill of sale applies only to the character and privileges of the vessel as an American ship.[1] A bill of sale is valid though it do not recite the certificate prescribed by the registry act.[2] So if blanks are left to be afterward filled up by consent of the parties.[3] The omission to recite the certificate of registry merely forfeits the national character of the vessel.[4] An inaccurate recital does not avoid the sale, but merely deprives the vessel of her national character.[5]

In England, the omission invalidates the sale.[6] No form for a transfer is prescribed by law.[7]

1 The Amelie, 6 Wall. 18; Sharp v. United Ins. Co. 14 Johns. 203; D'Wolf v. Harris, 4 Mason, 515; Insurance Co. v. Polleys, 13 Peters, 157; Weston v. Penniman, 1 Mason, 306; Ohl v. Eagle Ins. Co. 4 Mason, 172. And see Rev. Stats. sec. 4170.

2 U. S. v. Willing, 4 Cranch, 43; D'Wolf v. Harris, 4 Mason, 515; Scudder v. Calais Co. 1 Cliff. 380; Mitchell v. Taylor, 32 Me. 434.

3 Woolley v. Constant, 4 Johns. 54.

4 D'Wolf v. Harris, 4 Mason, 515.

5 Phillips v. Ledley, 1 Wash. C. C. 226.

6 Westerdell v. Dale, 7 Term Rep. 306.

7 Hunter v. Parker, 7 Mees. & W. 322; Fox v. The Lodemia, Crabbe, 271.

§ 59. Transfer of licensed vessels.—A licensed vessel transferred to a foreigner is forfeited, although the license has expired;[1] nor can a licensed vessel be sold in a foreign port unless her license be previously surrendered.[2] The place of sale cannot extend to a foreign port, but may be at sea, on the coast of the United States, or on the fishing banks.[3] The transfer of a vessel is governed by the law of the place of registration.[4] A registered vessel which continues to use its register after a sale is liable to forfeiture, and a sale by way of trust, confidence, or otherwise is sufficient.[5] The forfeiture takes place at the moment of sale to an alien.[6]

1 The Two Friends, 1 Gall. 118; Phillips v. Ledley, 1 Wash. C. C. 226; The Active v. U. S. 7 Cranch, 100; U. S. v. The Hawke, Bee, 34; The Julia, 1 Gall. 233; U. S. v. The Mars, 1 Gall. 237; The Eliza, 2 Gall. 4; U. S. v. The Parynthia Davis, 1 Cliff. 532; The Nymph, 1 Sum. 516. And see Rev. Stats. secs. 4377, 4378.

2 U. S. v. The Hawke, Bee, 31; Kelly v. The Prosperity, Ibid. 38; British Consul v. The Favourite, Bee, 39.

3 U. S. v. The Hawke, Bee, 31.

4 Crapo v. Kelly, 16 Wall. 627; Perry Manuf. Co. v. Brown, 2 Wood. & M. 467; Lamb v. Durant, 12 Mass. 54; Joy v. Sears, 9 Pick. 64; D'Wolf v. Harris, 4 Mason, 535; Thuret v. Jenkins, 7 Mart. 318; Gardner v. Howland, 2 Pick. 599; The City of Norwich, 1 Ben. 103.

5 The Margaret, 9 Wheat. 421.

6 The Florenzo, Blatchf. & H. 52.

§ 60. Title, how evidenced.—The evidence of title to a sea-going vessel is to be looked for in the ship's papers and registry.[1] The transfer should be evidenced by bill of sale or other written document,[2] but it is not absolutely essential so far as the title is concerned.[3] Independently of the Registry Act, ownership may be at least *prima facie* established by evidence of possession under claim of title, or other matter *in pais*, as in case of any other chattel.[4]

1 Fontaine v. Beers, 19 Ala. 722.

2 Weston *v.* Penniman, 1 Mason, 306; Seamans *v.* Loring, Ibid. 138; Carrol *v.* Boston Mar. Ins. Co. 8 Mass. 515; Fontaine *v.* Beers, 19 Ala. 722; The Sisters, 5 C. Rob. 155; Robinson *v.* McDonnell, 2 Barn. & Ald. 134. But see Philips *v.* Ledley, 1 Wash. C. C. 226; Ohl *v.* Eagle Ins. Co. 4 Mason, 172, explaining and distinguishing Lamb *v.* Durant, 12 Mass. 54; Taggard *v.* Loring, 16 Mass. 336; Oliver *v.* Green, 3 Mass. 133; Bartlett *v.* Walter, 13 Mass. 267.

3 Wendover *v.* Hogeboom, Anth. 121; Fontaine *v.* Beers, 19 Ala. 722.

4 U. S. *v.* Amedy, 11 Wheat. 392; Hozey *v.* Buchanan, 16 Peters, 215; Bas. *v.* Steele, 3 Wash. C. C. 381; U. S. *v.* Peterson, 1 Wood. & M. 314; Leonard *v.* Huntington, 15 Johns. 298; Scudder *v.* Calais &c. Co. 1 Cliff. 380; Ohl *v.* Eagle Ins. Co. 4 Mason, 333; Wendover *v.* Hogeboom, 7 Johns. 308; Robertson *v.* French, 4 East, 130; Thomas *v.* Foyle, 5 Esp. 88; Pirie *v.* Anderson, 4 Taunt. 652; Nostra Signora de los Dolores, 1 Dod. 290; Taggard *v.* Loring, 16 Mass. 336.

§ 61. Validity of sale.—If a vessel is sold "with all faults," it is immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser.[1] "With all faults" means with such faults as may be consistent with its being the thing described.[2] The rule of *caveat emptor* applies unless the seller warrants the vessel against its hidden defects, which are those which could not be discovered by simple inspection.[3] Material representations made to effect the sale have the effect of a warranty.[4] Where a ship was described in the bill of sale as "copper-fastened," and was not what is known in the trade as "copper-fastened," this was considered a breach of the warranty;[5] but a representation that a vessel is of greater dimensions than she really was, is not in the nature of a warranty.[6]

1 Baglehole *v.* Walters, 3 Camp. 154, disapproving Mellish *v.* Motteux, Peake, 115. And see Schneider *v.* Heath, 3 Camp. 506; Taylor *v.* Bullen, 5 Ex. 779; 1 Eng. L. & E. 472.

2 Smith *v.* Richards, 13 Peters, 41; Shepherd *v.* Kain, 5 Barn. & Ald. 400.

3 Bulkley *v.* Honold, 19 How. 390; The Avon, 1 Brown Ad. 175.

4 Schneider *v.* Heath, 3 Camp. 503; Shepherd *v.* Kain, 5 Barn. & Ald. 240. But see Dyer *v.* Lewis, 7 Mass. 284.

5 Shepherd *v.* Kain, 5 Barn. & Ald. 240.

6 Dyer *v.* Lewis, 7 Mass. 284.

§ 62. Rights and liabilities of purchaser.—A purchaser of a share of a part owner does not by the purchase acquire the authority to command her.[1] A sale on conditions does not vest the title till the conditions are complied with,[2] so title does not usually vest on a first payment.[3] The purchaser of a vessel which proves unseaworthy may, under the laws of Louisiana, have an action for a reduction of the price.[4] Where the bill of sale is unconditional, the purchaser is liable for supplies.[5] A first part owner

5 Hozey *v.* Buchanan, 16 Peters, 215; Weston *v.* Penniman, 1 Mason, 306; Ring *v.* Franklin, 2 Hall, 1; Wendover *v.* Hogeboom, 7 Johns. 308.

7 Barnes *v.* Taylor, 31 Mc. 320.

8 Hobbs *v.* The Interchange, 1 W. Va. 57; Mills *v.* Jacot, 8 Bosw. 161; Cape Fears S. Co. *v.* Conner, 3 Rich. 335; Calais S. Co. *v.* Van Pelt, 2 Black, 372.

9 Mott *v.* Ruckman, 3 Blatchf. 71; S. C. 16 Law Rep. N. S. 397.

10 Mott *v.* Ruckman, 3 Blatchf. 71.

11 Hicks *v.* Williams, 17 Barb. 523.

12 Hill *v.* The Golden Gate, 1 Newb. 308.

13 The Minnie, 6 Am. Law Reg. 328.

14 The Draco, 2 Sum. 157; Fontaine *v.* Beers, 19 Ala. 722.

15 U. S. *v.* Gordon, 5 Blatchf. 18.

16 Bronde *v.* Haven, Gilp. 598.

§ 64. Mortgage of vessel.—A mortgage of a vessel is not a maritime transaction.[1] It may be given for a pre-existing debt.[2] A person who loans money to another to purchase a vessel is not a part owner;[3] if he takes title in his own name he is a mortgagee.[4] The legal title and right to possession is in the mortgagee.[5] He may take out a register in his own name,[6] and although not in possession he may maintain trover against the assignee of the mortgagor;[7] but he has no lien on her earnings.[8] If a mortgagee satisfies the claim of a charterer for loss or delay of voyage, he is entitled to come in upon the remnants in court for repayment.[9] A lien for supplies in a foreign port in the form of a mortgage is not lost by taking other security.[10] A mortgage does not invalidate an arrangement made pursuant to previous authority from the mortgagor, and before the mortgage could be known.[11] A mortgage executed by a fictitious owner, the mortgagee having notice of the facts, is void.[12] Actual possession in the mortgagee is not indispensable.[13] Any sufficient reason for not changing possession is sufficient, as want of possession is not *per se* fraudulent.[14] The rights of the mortgagee cannot be defeated by a subsequent attachment,[15] but it is postponed to a bottomry interest.[15] The enrollment is not an element of the lien.[16] An enrollment or registry without the knowledge of the mortgagee will not affect his title.[17] Re-enrollment in the name of the transferee, and a policy taken out in his name, will not make it more than the mere security for a loan.[18]

1 Bogart *v.* The John Jay, 17 How. 402; Deely *v.* The Ernest and Alice, 2 Hughes, 77; Hurry *v.* The John and Alice, 1 Wash. C. C. 293.

2 Greely *v.* Smith, 3 Wood. & M. 236.

3 The Blohm, 1 Ben. 228.

4 The Panama, Olcott, 343.

5 Holmes v. Sprowle, 31 Me. 73; The J. B. Lunt, 11 N. Y. Leg. Obs. 137; Foster v. Perkins, 42 Me. 168; Weston v. Penniman, 1 Mason, 318; Addis v. Baker, 1 Anstr. 222; Speldt v. Lechmere, 13 Ves. Jr. 588; Ex parte Houghton, 17 Ves. Jr. 252; Camden v. Anderson; 5 Term Rep. 709.

6 Ring v. Franklin, 2 Hall, 1.

7 Tenney v. State Bank, 20 Wis. 152.

8 The Panama, Olcott, 343.

9 The Hilarity, Blatchf. & H. 90.

10 Brown v. North, 16 Eng. L. & E. 486.

11 De Herrera v. The Acme, 7 Int. Rev. Rec. 149.

12 The Romp, Olcott, 196.

13 Almy v. Wilbur, 2 Wood. & M. 387; Badlam v. Tucker, 1 Pick. 389; Winsor v. McLellan, 2 Story, 497; Addis v. Baker, 1 Anstr. 222.

14 Leland v. The Medora, 2 Wood. & M. 117; Lempriere v. Pasley, 2 Term Rep. 485; D'Wolf v. Harris, 4 Mason, 534.

15 White's Bank v. Smith, 7 Wall. 646.

16 Hill v. The Golden Gate, Newb. 308; The Mary Bell, 1 Sawy. 135.

17 Holmes v. Sprowle, 31 Me. 73.

18 Morgan v. Shinn, 15 Wall. 105.

§ 65. Registration of mortgage.—The mortgage of a vessel should be recorded in the office of the collector of customs of the home port of the vessel, and not at the port of last registry and enrollment;[1] the act of Congress respecting the recording of mortgages superseded the State laws as to place of filing.[2] The notice imparted by registry, under State laws, does not affect third parties, unless the owner continues to reside in the State where the vessel is registered.[3] To be valid, without actual notice, a mortgage must be recorded.[4] A purchaser with notice of an unrecorded mortgage takes subject to the mortgage.[5] In such case, it is valid till the assignee of the owner records the assignment and gives public notice.[6] The recording of a mortgage gives it priority over a subsequent purchaser or mortgagee;[7] but it does not take priority over a subsequent lien of material-men;[8] but it takes precedence over the liens of material-men claiming under State laws.[9] A lien for advances for necessaries furnished in a foreign port takes priority over a mortgage to creditors at the home port;[10] so a mortgage lien is postponed to the lien for seaman's wages.[11]

1 White's Bank v. Smith, 7 Wall. 646; Aldrich v. The Ætna Ins. Co. 8 Wall. 491; Blanchard v. The Martha Washington, 1 Cliff. 463; Foster v. Chamberlain, 41 Ala. 153; Hill v. The Golden Gate, Newb. 308; St. Louis v. Ferry Co. 11 Wall. 431; McAllister v. The Sam Kirkman, 1 Bond, 378; Hays v. P. M. S. S. Co. 17 How. 596; Mott v. Ruckman, 3 Blatchf. 71; Thompson v. Van Vechten, 5 Abb. Pr. 453; Chadwick v. Baker, 54 Me. 9. But see Potter v. Irish, 10 Gray, 416. And see Rev. Stats. sec. 4192.

2 Robinson v. Rice, 3 Mich. 235; Shaw v. McCandless, 36 Miss. 296.

3 Thomas v. The Kosciusko, 11 N. Y. Leg. Obs. 38.

4 Foster v. Chamberlain, 41 Ala. 156; The Romp, Olcott, 196.

5 Cape Fear St. Boat Co. v. Conner, 3 Rich. 335.

6 Leland v. The Medora, 2 Wood. & M. 92.

7 White's Bank v. Smith, 7 Wall. 656; The Grace Greenwood, 2 Biss. 133; Aldrich v. The Ætna Ins. Co. 8 Wall. 491; S. C. 26 N. Y. 92; Francis v. The Harrison, 1 Sawy. 353.

8 Reeder v. The George's Creek, 3 Am. Law Reg. 222. But see The Scio, Law Rep. 1 Adm. & Ec. 353.

9 The Grace Greenwood, 2 Biss. 131; The Selt, 3 Biss. 350; The Island City, 1 Low. 375; In re Scott, 1 Abb. U. S. 342; 3 Bank. Reg. 182, distinguishing Provost v. Wilcox, 17 Ohio, 389; The Two Ellens, 3 Law Rep. Ad. & E. 345.

10 The Emily Souder, 17 Wall. 666; The Acme, 7 Blatchf. 366.

11 The Island City, 1 Low. 379, note; Donnell v. The Starlight, 103 Mass. 227.

§ 66. Rights and liabilities of mortgagee. — A mortgagee is not entitled to the earnings of the vessel before possession delivered.[1] If he fails to take possession within a reasonable time after the opportunity presents, his title is liable to be defeated by any third party who acquires a right to the ship in ignorance of the mortgage title, and in good faith.[2] The mortgagee is not entitled to claim the surplus on a sale of the vessel under decree in admiralty, in preference to a privileged creditor with a maritime lien.[3] If a mortgagee does any acts by which he holds himself out as owner, he becomes responsible and liable as owner,[4] as where his name appears on the registry as owner,[5] or where he pays bills and suffers judgment to go against him on default, it is sufficient to render him liable to the co-owners for contribution.[6] A mortgagee only nominally an owner, and not publicly known as an owner, is not liable *in personam* for supplies furnished on the credit of the vessel.[7]

1 Philips v. Ledley, 1 Wash. C. C. 226; Deely v. The Ernest & Alice, 2 Hughes, 77; Gardner v. Cazenove, 1 Hurl & N. 423; Chennery v. Blackburne, 1 H. Black. 117; Brancker v. Molyneux, 3 Scott N. R. 334.

2 The Romp, Olcott, 196; The D. M. French, 1 Low, 44; Portland Bank v. Stubbs, 6 Mass. 422; Tucker v. Buffington, 15 Mass. 477; Badlam v. Tucker, 1 Pick. 389; Hay v. Fairbairn, 2 Barn. & Ald. 193; Mair v. Glennie, 4 Maule & S. 240; Atkinson v. Maling, 2 Tenn. Rep. 462; Ex parte Matthews, 2 Ves. Sr. 272.

3 Thomas v. The Kosciusko, 11 N. Y. Leg. Obs. 38, disapproving The Hendrik Hudson, 7 Law Rep. N. S. 93.

4 Hodgson v. Butts, 3 Cranch, 140; Miln v. Spinola, 4 Hill, 177; McLellan v. Osborne, 51 Me. 85; Tucker v. Buffington, 15 Mass. 477; Neil v. Cochran, 1 Brown Adm. 162.

5 Tucker v. Buffington, 15 Mass. 477; Neil v. Cochran, 1 Brown Adm 162.

6 McLellan v. Osborne, 51 Me. 85.

7 Dugan v. Pentz, 2 Hughes, 66.

fied out of them ;[9] having once attached, it follows proceeds into the hands of assignees,[10] and lien-holders are entitled to the benefit of increase in value on sale of the property.[11]

1 The Rock Island Bridge, 6 Wall. 213; Weber v. Lee County, 6 Wall. 215; Harmer v. Bell, 22 Eng. L. & E. 62.

2 The Avon, 1 Brown Adm. 179; The Batavia, 2 Dods. 500.

3 The Williams, 1 Brown Adm. 224; Freeman v. Buckingham, 18 How. 189; The Bold Buccleugh, 2 Eng. L. & E. 536.

4 Phillips v. Tapper, 2 Pa. St. 323; Andrews v. Wall, 3 How. 568; The Richard Busteed, 1 Sprague, 442.

5 The Naumkeag S. C. Co. v. The Edwin, 1 Cliff. 330; The Williams, 1 Brown Adm. 224; The Paragon, 1 Ware, 322; The Phebe, 1 Ware, 263; Hewitt v. Buck, 17 Me. 147; The Druid, 1 W. Rob. 391; The Bold Buccleugh, 2 Eng. L. & E. 536.

6 The Kalorama, 10 Wall. 217; The Guy, 9 Wall. 758, affirming S. C. 1 Ben. 112.

7 The Eclipse, 3 Biss. 103; The Nestor, 1 Sum. 73; The Chusan, 2 Story, 455.

8 Shrewsbury v. The Two Friends, Bee, 438; Cotterel v. Hook, 1 Doug. 97.

9 The Siren, 7 Wall. 152.

10 Cutler v. Rae, 7 How. 729; The George Prescott, 1 Ben. 6; Dike v. The St. Joseph, 6 McLean, 573; Pitman v. Hooper, 3 Sum. 50, 286; Fitz v. The Galliot Amelie, 2 Cliff. 448; Brown v. Lull, 2 Sum. 443; Idle v. Royal Exchange Assu. Co. 8 Taunt. 755.

11 The Aline, 1 W. Rob. 111.

§ 70. Authority of master.—The master, in a foreign port, may bind the owners for repairs and supplies, or pledge the credit of the vessel for advances,[1] though he be charterer and owner *pro hac vice*.[2] Only those acts of the master performed within the scope of his authority, create a lien on the vessel,[3] and all contracts within the scope of his authority, and those only, create liens,[4] in any other than the home port of the vessel.[5] A vessel is not subject to the lien for performance of a contract, where no contract has been made.[6] Generally, he cannot hypothecate to the consignee,[7] nor pledge the vessel for advances to buy cargo.[8]

See BOTTOMRY, MASTER.

1 The Aurora, 1 Wheat. 96; The Hilarity, Blatchf. & H. 90; The Gustavia, Blatchf. & H. 189; Thomas v. Osborn, 19 How. 22 ; Milward v. Hallett, 2 Caines, 77; Marquand v. Webb, 16 Johns. 89; James v. Bixby, 11 Mass. 34; Hoskins v. Slayton, Hardw. 376; Rich v. Coe, 2 Cowp. 636; Speerman v. Degrave, 2 Vern. 643; Stewart v. Hall, 2 Dow, 29; Ex parte Bland, 2 Rose, 91; Webster v. Seekamp, 4 Barn. & Ald. 352; Arthur v. The Cassius, 2 Story, 81.

2 Flaherty v. Doane, 1 Low, 150; Thomas v. Osborn, 19 How. 22; Thorp v. Hammond, 12 Wall. 416; Andrews v. Wall, 3 How. 568; The General Smith, 4 Wheat. 438; The St. Jago de Cuba, 9 Wheat. 409; Ramsay v. Allegre, 12 Wheat. 611.

3 The Waldo, 2 Ware (Dav.) 161; The Phebe, 1 Ware. 263.

6 The Sarah Starr, 1 Sprague, 463; The A. R. Dunlap, 1 Low. 356; The Grapeshot, 9 Wall. 129; The Lulu, 10 Wall. 192; The Kalorama, 10 Wall. 204; The Patapsco, 13 Wall. 329; The Emily Sonder, 17 Wall. 669; The Virgin, 8 Peters, 538.

7 The Neversink, 5 Blatchf. 539.

8 The Lulu, 10 Wall. 201; The Fortitude, 3 Sum. 228; The Paragon, 1 Ware, 322.

9 The James Guy, 1 Ben. 112; S. C. 5 Blatchf. 497; The Eledona, 3 Ben, 37; Pratt *v.* Reed, 19 How. 361; Thomas *v.* Osborn, 19 How. 22; The Neversink, 5 Blatchf. 540; The A. R. Dunlap, 1 Low. 356; The Lady Franklin, 1 Ch. L. N. 273; The Sophie, 1 W. Rob. 368; The Maitland, 2 Biss. 204.

10 The Mary Bell, 1 Sawy. 135.

11 The James Guy, 1 Ben. 112.

§ 72. Presumptions of necessity.—That the supplies were ordered by the master is a presumption that they were properly furnished on the credit of the vessel.[1] The necessity for credit is presumed from proof of the necessity for repairs and supplies, when furnished in good faith, or for advances to pay for the same.[2] It is sufficient to prove that the necessaries were ordered, and were in their nature generally necessary.[3] Whatever is fit and proper, and whatever a prudent owner would have ordered if present, is within the meaning of the word "necessaries"[4]—this is the first test of necessity.[5] When circumstances are such as to raise a presumption that there was no necessity for hypothecation, it becomes incumbent on the libelant to show a necessity for credit.[6] Where necessity appears, the presumption is, if furnished in good faith, that the ship is responsible, unless it is affirmatively shown that the master had funds or other resources, and that the furnishers knew, or ought to have known the fact,[7] or that the funds could have been raised on the personal credit of the owner.[8] The presumption is not repelled by proof of possession of funds with the master.[9] In case of extreme necessity, the presence of the owner will not affect the validity of the lien.[10]

1 The Kalorama, 10 Wall. 204; The Lulu, 10 Wall. 192; The St. Joseph, 1 Brown Adm. 202.

2 The Lulu, 10 Wall. 203; The Kalorama, Ibid. 216; Insurance Co. *v.* Baring, 20 Wall. 164; The Lottawanna, 21 Wall. 588; The Grapeshot, 9 Wall. 141; The Washington Irving, 2 Ben. 319; The Prospect, 3 Blatchf. 526; The Eledona, 10 Blatchf. 514; The Sarah Starr, 1 Sprague, 458; The Virgin, 8 Peters, 538. But see Thomas *v.* Osborn, 19 How. 22; Pratt *v.* Reed, Ibid. 359.

3 Sroder *v.* The Collier, 2 Pittsb. Rep. 304.

4 The Grapeshot, 9 Wall. 129; The Fortitude, 3 Sum. 246; Webster *v.* Seekamp, 4 Barn. & Ald. 352; The Medora, 1 Sprague, 138; The Alexander, 1 W. Rob. 288, 346; The Gustavia, Blatch & H. 191.

5 The James Guy, 1 Ben. 114; The Alexander, 1 W. Rob. 288.

6 The Guy, 1 Ben. 115; Pratt *v.* Reed, 19 How. 359.

The Sam Kirkham, 1 Bond, 378; Thomas *v.* The Kosciusko, 11 N. Y. Leg. Obs. 38; Tree *v.* The Indiana, Crabbe, 479; The Albany, 4 Dill. 444.

7 The Mary Bell, 1 Sawy. 135; The Island City, 1 Low. 375. And see The Alice Taintor, 5 Ben. 391; McDermott *v.* The S. G. Owens, 1 Wall. Jr. 370.

8 Raymond *v.* The Ellen Stewart, 5 McLean, 269.

9 The Eagle, Bee, 78 Shrewsbury *v.* The Two Friends, Ibid. 433; Pritchard *v.* The Lady Horatia, Bee, 167; The Alida, Abb. Adm. 169; The Stephen Allen, Blatchf. & H. 178; The Maitland, 2 Biss. 206; The Jerusalem, 1 Gall. 349; De Lovio *v.* Bolt, 2 Gall. 484; The Mary Bell, 1 Sawy. 137; The Nestor, 1 Sum. 73; The Draco, 2 Sum. 177; Zane *v.* The President, 4 Wash. C. C. 455; The Aurora, 1 Wheat. 96; N. J. S. N. Co. *v.* Merch. Bk. 6 How. 391; Gardner *v.* The New Jersey, 1 Pet. Adm. 223; Hussie *v.* Christie, 13 Ves. Jr. 594; Ex parte Halket, 19 Ves. Jr. 474; Farmer *v.* Davies, 1 Term. Rep. 108.

10 The Belfast, 7 Wall. 624; The Lulu, 1 Abb. U. S. 193; Selden *v.* Hendrickson, 1 Brock. 403; The Kalorama, 10 Wall. 212; The St. Lawrence, 3 Ware, 211; The Hull of a New Brig, 3 Law Rep. 69; The Mary Bell, 1 Sawy. 138. But see Levering *v.* Bank of Columbia, 1 Cranch C. C. 152; Stearns *v.* Doe, 12 Gray, 482; Bliss *v.* Ropes, 9 Allen, 344.

§ 74. When do not attach.—The maritime lien does not attach on a contract made on land, and to do work within the body of the county;[1] nor if the agent or consignee makes the advances or repairs.[2] If the master has or can command other funds, he cannot hypothecate for advances for necessaries;[3] he must first exhaust his own means and credit.[4] When the master had money and paid the contractors, creditors of the contractors have no lien.[5] The lien does not attach on a special contract made with the master individually[6] or the owner.[7] The master is not authorized to hypothecate, if the owner has a representative who will advance the necessary funds, or if the same can be procured by other means;[8] but if the creditor acts in good faith, without knowledge or suspicion of the existence of funds or personal credit, or could not on reasonable inquiry acquire knowledge thereof, the owner is bound, notwithstanding they existed, or might have been known to exist.[9] Due diligence is imposed on the creditor to know the contrary;[10] but bad faith is not established by the fact that the master had funds which he ought to have applied.[11] If the agent or consignee made the repairs or advances, to whom the owner was known, and with whom the owner had good credit, the lien does not attach.[12] No lien attaches for port charges.[13]

1 Phillips *v.* The Thomas Scattergood, Gilp. 7, distinguishing Woolf *v.* The Oder, 2 Pet. Adm. 261.

2 Leland *v.* The Medora, 2 Wood. & M. 97; Harper *v.* The New Brig, Gilp. 536.

3 The William and Emmeline, Blatchf. & H. 66; Boreal *v.* The Golden Rose, Bee, 131; Forbes *v.* The Hanna, Hopk. 176; The Hero, 2 Dods. 139; Joy *v.* Allen, 2 Wood. & M. 328; Gordon *v.* Mass. F. & M. Ins. Co. 2 Pick. 249.

4 Drinkwater v. The Spartan, 1 Ware, 162; The Hero, 2 Dods. 139.

5 The Eledona, 10 Blatchf. 514, distinguishing The Grapeshot, 9 Wall. 130; The Lulu, 10 Wall. 201.

6 The Amstel, Blatchf. & H. 217; Ex parte Lewis, 2 Gall. 483; Hutton v. Bragg, 7 Taunt. 14; The Asa R. Swift, Newb. 554; Zane v. The President, 4 Wash. C. C. 456.

7 Putnam v. The Polly, Bee, 159; O'Hara v. The Mary, Ibid. 100; Cossart v. Lawdley, 3 Mod. 244.

8 Pritchard v. The Lady Horatia, Bee, 169; Boreal v. The Golden Rose, Ibid. 131; Shrewsbury v. The Two Friends, Ibid. 433.

9 The Aurora, 1 Wheat. 96; The Virgin, 8 Peters, 538; The Fortitude, 3 Sum. 257; The Nelson, 1 Hagg. Adm. 169; The Jane, 1 Dods. 461; The Rhadamanthe, Ibid. 201; La Ysabel, Ibid. 273; The Hero, 2 Dods. 139; The Kalorama, 10 Wall. 204; The Custer, Ibid. 215; The Lottawanna, 21 Wall. 589.

10 Insurance Co. v. Baring, 20 Wall. 164; The Lulu, 10 Wall. 201; The Patapsco, 13 Wall. 329.

11 The Lulu, 10 Wall. 201; The Sarah Starr, 1 Sprague, 453.

12 Leland v. The Medora, 2 Wood. & M. 97; Reade v. Commercial Ins. Co. 3 Johns. 352.

13 The Rodney, Blatchf. & H. 231, questioning Ripley v. Gelston, 9 Johns. 201.

§ 75. Lien of material-men.—Material-men have a three-fold security, the master, the owners, and the vessel.[1] The general maritime law gives a lien for necessary repairs and supplies furnished to a foreign vessel,[2] unless it appears that the lien was waived,[3] or unless it can be inferred that the master has money, or the owner credit,[4] and notwithstanding any agreement between the owners and the master.[5] It attaches without any express agreement therefor[6]—all that is necessary to create the lien is that the supplies be actually furnished,[7] though a part of the supplies was dispensed to the passengers.[8] They are presumed to be furnished on the credit of the vessel,[9] and material-men have a lien for the whole amount due them.[10] It attaches on the order of the master, even against a former owner who claims she was sold in fraud;[11] material-men not being affected by the fraudulent character of transfers by which a vessel is placed in the position of a foreign vessel.[12] The contract to furnish materials and supplies to a vessel launched and afloat, is a maritime contract,[13] and no unforeseen or unexpected emergency need be shown to warrant the lien.[14] If the master has no funds, or no credit, or the owners were without such means as the master could command, the lien attaches.[15] Consignees in a foreign port, without funds, may have a lien for supplies furnished by them.[16] Ship-chandlery includes everything necessary to the furnishing and equipping a vessel, so as to make her seaworthy;[17] it includes, not only stores, stoves, hardware and

terial-men, for supplies furnished to a vessel at her home port,[1] even if the vessel be engaged in foreign commerce.[2] Under the ancient admiralty law of England, the lien attached, for repairs and supplies, as well to domestic as to foreign vessels.[3] The general maritime lien does not attach unless it is shown that the supplies could not have been obtained upon the personal credit of the owner.[4] Where materials were furnished under orders of a contractor who was paid by the master, no lien was created against the vessel affecting the vessel in the hands of a *bona fide* purchaser:[5] nor when furnished at the instance of the owner when not on a voyage;[6] nor when orders were given by a purchaser to whom no bill of sale had been passed;[7] nor where materials were furnished by previous owners at the home port on a vessel in the hands of her owners in another State.[8] Where the supplies are furnished under circumstances showing an intent to trust to the personal credit of the master, owner, or other person interested, no lien arises.[9]

1 The Mary Bell, 1 Sawy. 135. But see Gill *v.* The Continental, 8 West. Jur. 232; Turnbull *v.* The Enterprise, Bee, 345, distinguishing Rich *v.* Coe, Cowp. 636.

2 The Edith, 11 Amer. Law Reg. 214; The Circassia, 12 Amer. Law Reg. 291; 5 Amer. L. T. 482.

3 The Lottawanna, 21 Wall. 599; Hoare *v.* Clement, 2 Shaw, 338; The Neptune, 3 Hagg. Adm. 129; Justin *v.* Ballam, 2 Ld. Raym. 805; Watkinson *v.* Barnardiston, 2 P. Wms. 367; Wilkins *v.* Carmichael, 1 Doug. 101; Ex parte Shank, 1 Atk. 234.

4 Pratt *v.* Reed, 19 How. 359; The Sarah Starr, 1 Sprague, 453; The Sea Lark, Ibid. 571; The Lady Franklin, 1 Biss. 561.

5 The Eledona, 10 Blatchf. 511. And see Smith *v.* Eastern R. R. Co. 1 Curt. 253; S. C. 6 Law Rep. N. S. 401.

6 Woodruff *v.* The Levi Dearborn, 4 Am. Law J. 88, 97.

7 The John Farron, 7 Ben. 53.

8 Jones *v.* The Rattler, Taney, 456.

9 The Sea Flower, 1 Blatchf. 361; Zane *v.* The President, 4 Wash. C. C. 453; Moore *v.* The Fashion, Newb. 49; S. C. 8 Law Rep. N. S. 50; 6 McLean, 472; The Chusan, 2 Story, 455; The John Walls, Jr.; 1 Sprague, 170; S. C. 2 Law Rep. N. S. 24; The Abby Whitman, 7 Law Rep. N. S. 322. But compare The Nestor, 1 Sum. 73; The Antarctic, 1 Sprague, 206; S. C. 5 Law Rep. N. S. 578.

§ 77. Lien for repairs.—A contract for necessary repairs to a vessel in a foreign port creates a lien under the maritime law,[1] notwithstanding the owner was present, if done on the credit of the vessel,[2] and the vessel will be liable therefor at its home port;[3] but necessity for the repairs and for credit must be shown.[4] The master is not authorized to hypothecate where the necessity was not urgent, and there were means of communicating with the owners.[5] He is bound to apply moneys in his hands to-

wards the repairs before he can hypothecate.[6] Necessity for credit is proved where such circumstances of exigency are shown as would induce a prudent owner to order the repairs.[7] Repairs made on contract with the owner, and not at the time claimed as a lien, and there being no immediate necessity, do not create a lien;[8] so no lien arises where the credit of the agent is taken.[9] Where persons in good faith give credit for necessary repairs to a vessel as a foreign boat, they are not affected by the fraudulent character of the transfer placing her in the position of a foreign boat.[10] The lien for repairs attaches at a home port, if done on the credit of the vessel;[11] otherwise not.[12] Contracts for repairs to be made at the wharf are maritime,[13] but no lien attaches on a contract made on land, the owner being present.[14]

1 The Aurora, 1 Wheat. 96; The General Smith, 4 Wheat. 438; Phelps v. The Camilla, Taney, 400; The Richard Busteed, 1 Sprague, 447; Davis v. Child, 2 Ware, 71; Draco, 2 Sum. 177, denying Justin v. Ballam, 2 Ld. Raym. 805; Turnbull v. The Enterprise, Bee, 345. And see Peyroux v. Howard, 7 Peters, 324; Shrewsbury v. The Two Friends, Bee, 433; Jerusalem, 2 Gall. 349; Hussey v. Christie, 9 East, 426; Alexander, 1 Wm. Rob. 288, 346; Sam Slick, 2 Curt. 480; Kiersage, 3 Curt. 421, overruling 1 Ware, 546; The Edith, 94 U. S. 518.

2 Youngfall v. The James Guy, 5 Int. Rev. Rec 68; The Kalorama, 10 Wall. 204; The Custer, Ibid. 215.

3 The Christopher North, 6 Biss. 414.

4 The Neversink; The A. R. Dunlap, 1 Low. 356; The James Guy, 5 Blatchf. 496; S. C. 1 Ben. 112; The Grapeshot, 9 Wall. 129; The Sarah Starr, 1 Sprague, 453; The Sea Lark, 1 Sprague, 571; Burke v. The M. P. Rich, 1 Cliff. 308; The Eledona, 2 Ben. 31; The Washington Irving, 2 Ben. 318; The Maitland, 2 Biss. 205; Ex parte Lewis, 2 Gall. 484; Franklin v. Hosier, 4 Barn. & Ald. 341; Ex parte Halket, 19 Ves. Jr. 474; 3 Ves. & B. 135.

5 Goodwin v. U. S. 6 Ct. of Cl. 146.

6 The Packet, 3 Mason, 255; Cupisino v. Perez, 2 Dall. 195.

7 The Grapeshot, 9 Wall. 129; The Lulu, 10 Wall. 203; The Sea Lark, 1 Sprague, 571; The Mason, 2 Story, 463.

8 The Maitland, 2 Biss. 201, distinguishing Pratt v. Reed, 19 How. 359.

9 Phelps v. The Camilla, Taney, 400.

10 The McAllister v. The Sam Kirkman, 1 Bald. 369; The Alice Taintor, 5 Ben. 391.

11 Taylor v. The Commonwealth, 14 Am. Law Reg. 86.

12 The Transit, 4 Ben. 567.

13 Ex parte Easton, 95 U. S. 75.

14 Pritchard v. The Lady Horatia, Bee, 167; Forbes v. Hanna, Hopk. Ch. 176.

§ 78. Validity of lien for supplies.—The supplies must appear to be reasonable, or the money advanced for them to have been wanting, and there must be nothing to repel the ordinary presumption that the master acted under the authority of the owners.[1] It is no objection

that the owner was present when the supplies were furnished in a foreign port,[2] or that he gave directions in person,[3] if the understanding was that they were to be on the credit of the vessel.[4] The lien will be enforceable notwithstanding the owner resided at the port where some of the supplies were furnished,[5] and ignorance of the fact that a foreign owner resided at the port of supplies rebuts the presumption of the want of necessity for credit to the vessel;[6] but where the repairs and supplies were furnished at the request of the owner, they are presumed to be furnished on his credit.[7] It is no objection to the enforcement of the lien that a common-law action has been brought for the demand if it is still undetermined.[8] The lien attaches for provisions, although the creditor knows that the master took the vessel on shares, and that he is to victual and man her, if furnished on the credit of the vessel.[9] Where supplies were furnished to a vessel in distress, with the assent of the master, even where charterers were owners, and the material-men had notice thereof, the lien attaches.[10] A master may bind a steamer for necessaries when the general owner retains possession, and the charterer merely hires her.[11] A lien upon a mortgaged vessel in possession of the mortgagor is valid, and will be enforced after possession transferred to the mortgagee.[12]

1 The Fortitude, 3 Sum. 247; United Ins. Co. *v.* Scott, 1 Johns. 106; Ross *v.* The Active, 2 Wash. C. C. 226.

2 The Kalorama, 10 Wall. 204; The Custer, 10 Wall. 215.

3 The Grapeshot, 9 Wall. 129; The Lulu, 10 Wall. 192; The Kalorama, 10 Wall. 208; The Guy, 9 Wall. 578, distinguishing Thomas *v.* Osborn, 19 How. 22; Pratt *v.* Reed, 19 How. 359.

4 The Union Express, 1 Brown Adm. 541; The Kalorama, 10 Wall. 204.

5 The Walkyrien, 11 Blatchf. 241; S. C. 3 Ben. 395.

6 The Grapeshot, 9 Wall. 129; The Guy, 9 Wall. 758; The Lulu, 10 Wall. 192; The Walkyrien, 11 Blatchf. 241.

7 The Mary Bell, 1 Sawy. 139; Thomas *v.* Osborn, 19 How. 22.

8 The Kalorama, 10 Wall. 204; The Custer, Ibid. 215.

9 The Monsoon, 1 Sprague, 37; The Sarah Starr, 1 Sprague, 453; The Phebe, 1 Ware, 263; Freeman *v.* Buckingham, 18 How. 182; Thomas *v.* Osborn, 19 How. 22; Pratt *v.* Reed, 19 How. 359; Webb *v.* Peirce, 1 Curt. 104.

10 The Plymouth Rock, 13 Blatchf. 505; S. C. 7 Ben. 443.

11 The City of New York, 3 Blatchf. 187.

12 The Granite State, 1 Sprague, 277.

§ 79. Lien for services.—The lien for services is considered an element of the original contract and inherent therein.[1] The maritime contract includes services in the building, repairing, supplying, and navigating the vessel.[2] The services must be maritime to secure the lien.[3] It is

deemed maritime if substantially to be performed on water within the ebb and flow of the tide.[4] It is not limited to acts done for the benefit of the ship, or in the actual performance of seaman's duties.[5] Under the common law, a ship-carpenter or a shipwright has no lien for repairs after the vessel has passed out of his possession, on a contract made on land, at the place of the owner's residence;[6] so, work done in a dry dock is not of a maritime nature.[7] A stevedore has no maritime lien for services in loading and stowing cargo,[8] nor a ship-keeper.[9] A purchaser cannot acquire a lien for services;[10] on failure to perfect his title, he has no lien against a subsequent vendee for services performed anterior to the sale.[11]

See MASTER, SEAMAN, CARRIER, COLLISION.

1 The Infanta, Abb. Adm. 267; The Nestor, 1 Sum. 73.

2 Davis *v.* A New Brig, Gilp. 477; The Jerusalem, 2 Gall. 199; The Richard Busteed, 1 Sprague, 447.

3 Packard *v.* The Louisa, 2 Wood. & M. 53; The Eagle, Bee, 78; Flaherty *v.* Doane, 1 Low. 150; The Monsoon, 1 Sprague, 37.

4 The D. C. Salisbury, Olcott, 73, distinguishing Davis *v.* Lake Boat Enterprise, not reported.

5 Ringold *v.* Crocker, Abb. Adm. 346; Reed *v.* Canfield, 1 Sum. 195.

6 Pritchard *v.* The Lady Horatia, Bee, 169; Shrewsbury *v.* The Two Friends, Ibid. 433; Clinton *v.* The Hannah, Bee, 419; The General Smith, 4 Wheat. 438; The Marion, 1 Story, 68; S. C. 3 Law Rep. 250.

7 Bradley *v.* Bolles, Abb. Adm. 569; The Joseph Cunard, Olcott, 120; The Amstel, Blatchf. & H. 215; The Harriet, Olcott, 229.

8 Paul *v.* The Ilex, 2 Woods, 229; The Amstel, Blatchf. & H. 217; The A. R. Dunlap, 1 Low. 361; McDermott *v.* The S. G. Owens, 1 Wall. Jr. 370; Cox *v.* Murray, Abb. Adm. 343; The Joseph Cunard, Olcott, 124.

9 The Island City, 1 Low. 378; McDermott *v.* The S. G. Owens, 1 Wall. Jr. 372; The Havana, 1 Sprague, 402; Gurney *v.* Crockett, Abb. Adm. 493; The Sarah Jane, 2 Amer. Law Rev. 450.

10 Dowling *v.* The Reliance, 1 Woods, 284; Ohl *v.* Eagle Ins. Co. 4 Mason, 390.

11 The Mary Elizabeth, 3 Sawy. 491.

§ 80. Lien for advances.—It is not material whether the hypothecation is made directly to the furnishers of repairs and supplies, or to one who advances money on the credit of the vessel, to pay therefor, in a case of necessity.[1] The lender of money, in a foreign port, has a lien for his advances made for the payment of necessary expenses,[2] whenever it would attach for the necessaries themselves,[3] and necessaries include money;[4] but it is incumbent on the creditor to show the necessity.[5] The lien attaches for advances to the master for any purpose connected with the vessel or its employment,[6] at a place where neither the master nor the owner were known.[7] The presumption is, that the advances were made on the

credit of the vessel,[8] which is repelled only by clear and satisfactory proof that the master was in possession of funds, or of a credit of his own, or of his owners, and that the fact was known to the party making the advances.[9]

1 The Grapeshot, 9 Wall. 130; The Lulu, 10 Wall. 192; The Union Express, 1 Brown Adm. 539; The Emily B. Souder, 3 Ben. 159; S. C. 8 Blatchf. 337; The Sarah Harris, 7 Ben. 181; The Kalorama, 10 Wall. 204; The A. R. Dunlap, 1 Low. 361; The Gustavia, Blatchf. & H. 189; Robinson v. Lyall, 7 Price, 592; Arthur v. Barton, 6 Mees. & W. 138; Johns v. Simons, 2 Q. B. 425; Stonehouse v. Gent, 2 Q. B. 431; Edwards v. Havill, 14 Com. B. 107.

2 Wainwright v. Crawford, 17 How. 477; The Emily Souder, 17 Wall. 666; The J. F. Spencer, 5 Ben. 151; The Joseph Cunard, Olcott, 129; The Sarah Harris, 8 Ben. 28; The Hoyle, 4 Biss. 236; The Sophie, 1 W. Rob. 368; Wainwright v. Crawford, 3 Yeates, 131; S. C. 4 Dall. 225; Davis v. Child, 2 Ware, 71; The Hoyle, 4 Biss. 236; Collins v. The Fort Wayne, 1 Bond, 487; The A. R. Dunlap, 1 Low. 361; The Sarah Starr, 1 Sprague, 453; The James Guy, 1 Ben. 112; The Neversink, 5 Blatchf. 539.

3 The Union Express, 1 Brown Adm. 539; The Lulu, 10 Wall. 192.

4 Insurance Co. v. Baring, 20 Wall. 163; Minturn v. Maynard, 17 How. 477; The J. F. Spencer, 5 Ben. 152; Seamans v. Loring, 1 Mason, 127; The St. Lawrence, 3 Ware, 214; Tod v. The Sultana, 19 How. 362; The Onni, Lush. 154; The Albert Crosby, 3 Law Rep. Ad. & E. 37.

5 Mervin v. Shaller, 12 Conn. 489. Averages not necessaries—The Aaltje Willemina, 1 Law Rep. Ad. & E. 107.

6 Hurry v. The John & Alice, 1 Wash. C. C. 293; The Lottawanna, 21 Wall. 602; Beldon v. Campbell, 6 Ex. 886; Fox v. Holt, 4 Ben. 292; Rocher v. Busher, 1 Stark. 27; The Fortitude, 3 Sum. 264.

7 The Acme, 7 Blatchf. 366; S. C. 2 Ben. 386; The Emily B. Souder, 8 Blatchf. 337.

8 The Emily Souder, 17 Wall. 666; Insurance Co. v. Baring, 20 Wall. 159; The Grapeshot, 9 Wall. 130; The Lulu, 10 Wall. 192; The Kalorama, 10 Wall. 204; The Patapsco, 13 Wall. 329.

9 The Emily Souder, 17 Wall. 666; Murray v. Lazarus, 1 Paine, 572.

§ 81. Lien, when attaches.—If the lender has acted in good faith, and without any knowledge or suspicion of the existence of funds or personal credit, or could not upon reasonable inquiry acquire knowledge thereof, the owner is bound, notwithstanding they existed or might have been obtained.[1] The lien for advances attaches for advances to relieve a vessel in a stranded condition,[2] or to relieve from an action, but not from a threatened seizure,[3] or from an attachment,[4] or an arrest.[5] A lien does not attach for advances to pay a debt for which a vessel was attached in a foreign port at common law.[6] It attaches when the advances were made to the owner, and no especial arrangements were made for repayment,[7] or when agreed that the advances should be on the credit of the vessel.[8] It is not necessary that the loan should be made before the departure of the ship, nor that the money be expended on fitting out the ship, or be invested in

goods on which a risk is run.[9] Insurers have a lien for advances for necessary repairs, and a due bill of the master is conclusive unless impeached for fraud.[10] The lien for advances is not affected by any subsequent agreement;[11] but an express contract for payment is a waiver of the lien.[12]

1 The Aurora, 1 Wheat. 96; The Virgin, 8 Peters, 538; Conard *v.* Atlantic Ins. Co. 1 Peters, 386; 4 Wash. C. C. 662; Carrington *v.* Pratt, 18 How. 63; Thomas *v.* Osborn, 19 How. 22; Walden *v.* Chamberlain, 3 Wash. C. C. 290; The Fortitude, 3 Sum. 257; Greely *v.* Smith, 3 Wood. & M. 236; Furniss *v.* The Magoun, Olcott, 63; Ward *v.* Green, 6 Cowen, 173; The Jane, 1 Dod. 461; La Ysabel, Ibid. 273; The Rhadamanthe, Ibid. 201; The Hero, 2 Dod. 139; The Nelson, 1 Hagg. Adm. 169; Soares *v.* Rahn, 3 Moore P. C. 1; The Prince of Saxe-Coburg, 3 Hagg. Adm. 387; The Orella, Ibid. 84; The Calypso, Ibid. 162.

2 The Acme, 7 Blatchf. 366.

3 Janney *v.* The Bella Lee, 12 Int. Rev. Rec. 123.

4 The Hoyle, 4 Biss. 238; The Aurora, 1 Wheat. 96; The Romp, 2 Abb. U. S. 31.

5 The Boston, Blatchf. & H. 324.

6 The A. R. Dunlap, 1 Low. 350; The Gustavia, Blatchf. & H. 189.

7 The Eclipse, 3 Biss. 99.

8 The Kalorama, 10 Wall. 217; The Prospect, 3 Blatchf. 526; The Grapeshot, 9 Wall. 130; The St. Lawrence, 3 Ware, 214. And see Tod *v.* Pratt, 19 How. 362; The William and Emmeline, Blatchf. & H. 66; The Rhadamanthe, 1 Dod. 201; The Augusta, 1 Dod. 283.

9 Conard *v.* Atlantic Ins. Co. 1 Peters, 437; U. S. *v.* Delaware Ins. Co. 4 Wash. C. C. 418.

10 Collins *v.* The Fort Wayne, 1 Bond, 490.

11 The Emily Souder, 17 Wall. 666.

12 Murray *v.* Lazarus, 1 Paine, 572.

§ 82. Priority of liens.—Privileged liens are matters of strict right not to be extended by construction to cases not within the law which confers them.[1] A maritime lien on a vessel is paramount to a domestic lien under a statute of a subsequent date.[2] A creditor holding a maritime lien, and obtaining a decree thereon *in rem*, is entitled to payment in preference to a creditor having a coordinate lien.[3] Where no preference is obtained, co-ordinate liens are payable in the inverse order of their dates.[4] The sale of a vessel under the Ohio steamboat law does not divest a prior admiralty lien.[5] The claim of a vendor for balance of the purchase-money of a vessel takes priority over the lien for advances and supplies on a domestic vessel at her home port.[6] The lien for advances for necessaries takes priority over existing mortgages to creditors at the home port.[7] Liens under the Pennsylvania statute for the attachment of vessels have priority over a mortgage in the distribution of the fund on the mort-

Law Rep. 1 Adm. & Ec. 367; Hays *v.* Columbus, 23 Mo. 233; The General Jackson, 1 Sprague, 554.

12 Ex parte Lewis, 2 Gall. 435; Crawshay *v.* Homfray, 4 Barn. & Ald. 80; The Ranier, Deady, 441.

13 Fitz *v.* The Amelie, 2 Cliff. 448; Dike *v.* The St. Joseph, 6 McLean, 375; Kellum *v.* Emerson, 2 Curt. 83; distinguishing Sheppard *v.* Taylor, 5 Pet. 675; The Rock Island Bridge, 6 Wall. 213; The Avon, 1 Brown Ad. 178; The Phebe, 1 Ware, 263; The R. B. Forbes, 1 Sprague, 328; Vandewater *v.* Mills, 19 How. 82; The Rebecca, 1 Ware, 188; The Nestor, 1 Sum. 73; The America, 6 Law Rep. N. S. 294; The Hornet, Crabbe, 426; The Young Mechanic, 2 Curt. 404; The Feronia, Law Rep. 2 A. & E. 65; The Bengal, Swabey, 468; The Bold Buccleugh, 2 Eng. L. & E. 536.

§ 87. Liens on domestic vessels.—Under the general maritime law, a lien on a domestic vessel is not implied;[1] no lien attaching without a special statute.[2] State legislatures have power to create liens on domestic vessels, founded on maritime contracts,[3] but they cannot provide for their enforcement *in rem*,[4] or give any other than a common law remedy;[5] and if the statute should provide for its enforcement *in rem*, such provision would be unconstitutional and void.[6] The lien on a domestic vessel depends on the local law,[7] by which it is governed;[8] its existence is governed by the law of place,[9] and when imposed by law it is in effect an element of the original contract,[10] and partakes of the nature of maritime liens, and is enforceable *in rem* in the United States courts.[11]

1 The Alida, Abb. Adm. 169; Nail *v.* The Illinois, 6 McLean, 414; Surp. & Rem. of The Edith, 5 Ben. 436; S. C. 11 Blatchf. 451; The Circassian, 11 Blatchf. 472; Cunningham *v.* Hall, 1 Cliff. 43; Read *v.* Hull of a New Brig, 1 Story, 244; Macy *v.* De Wolf, 3 Wood & M. 203; Thorndike *v.* De Wolf, 6 Pick. 120; Wilkins *v.* Carmichael, 1 Doug. 101; The Belfast, 7 Wall. 624.

2 Leon *v.* Galceran, 11 Wall. 192; Edwards *v.* Elliott, 21 Wall. 556; The Island City, 1 Low. 377; The Francis *v.* Harrison, 1 Sawy. 356; Remnants in Court, Olcott, 383; The Panama, Ibid. 343; Post *v.* Kimberly, 9 Johns. 470; The Celestine, 1 Biss. 7; The Globe, 2 Blatchf. 427.

3 The Belfast, 7 Wall. 624; The Alida, Abb. Adm. 169; The Harrison, 2 Abb. U. S. 77; Harper *v.* The New Brig, Gilp. 541; The Jerusalem, 2 Gall. 191; Francis *v.* The Harrison, 1 Sawy. 355; Surp. and Rem. of The Edith, 5 Ben. 347; The William and Emmeline, Blatchf. & H. 69, distinguishing The Zodiac, 1 Hagg. Adm. 320; The Avon, 1 Brown Ad. 176, distinguishing The Milford, Swabey, 362; Williams *v.* Tearney, 8 Serg. & R. 58; Boylan *v.* The Victory, 40 Mo. 244; Morrison *v.* Burns, 41 Mo. 491.

4 The Belfast, 7 Wall. 644; The Alida, Abb. Adm. 165, 185; The Edith, 6 Bank. Reg. 460; The Kate Tremaine, 5 Ben. 71; The Globe, 2 Blatchf. 427; Moir *v.* The Dubuque, 3 Chic. L. N. 145; The Henrietta, Newb. 290; The Raritan, 10 Mo. 527.

5 The Globe, 2 Blatchf. 427; S. C. 5 Law Rep. N. S. 421; The Kaloparna, 10 Wall. 204; Ludington *v.* The Nucleus, 2 Amer. Law J. 563; The Belfast, 7 Wall. 645.

6 Surp. & Rem. of The Edith, 10 Blatchf. 466; 11 Amer. Law Reg. 214; The Circassian, 12 Amer. Law Reg. 291; Leon *v.* Galceran, 11 Wall.

1 Ashbrook *v.* The Golden Gate, Newb. 297; James *v.* The Pawnee, 19 Mo. 517.

2 Walker *v.* Blackwell, 1 Wend. 557; The Joseph E. Coffee, Olcott, 405, modifying Birbeck *v.* Hoboken Ferry Boats, 17 Johns. 54; and The Farmers' Delight *v.* Lawrence, 5 Wend. 564; Hancox *v.* Dunning, 6 Hill, 494.

3 The Celestine, 1 Biss. 1.

4 The Mary Gratwick, 2 Sawy. 344; The Young Mechanic, 2 Curt. 404.

5 The St. Mary, 3 Blatchf. 329.

6 Scott *v.* The Plymouth, 6 McLean, 466; Jones *v.* The Commerce, 14 Ohio, 403; Wick *v.* The Samuel Strong, 6 McLean, 594; Harper *v.* The New Brig, Gilp. 541; Purinton *v.* Hull of a New Ship, 2 Curt. 421; Smith *v.* The Eastern Railroad, 1 Curt. 253; Hills *v.* Elliott, 16 Serg. & R. 56; Hinchman *v.* Lybrand, 14 Serg. & R. 92; The Maggie Hammond, 9 Wall. 452; Chase *v.* Alliance Ins. Co. 9 Allen, 311.

7 Steamship Co. *v.* Joliffe, 2 Wall. 450; Steamship Co. *v.* Port Wardens, 6 Wall. 34; Ex parte McNiel, 13 Wall. 241; Hunt *v.* Mackey, 12 Met. 346; The California, 1 Sawy. 468; The America, 1 Low. 177; The Alaska, 3 Ben. 392; The Robert J. Mercer, 1 Sprague, 284; The Mary Gratwick, 2 Sawy. 344; The Havanna, 1 Sprague, 402; Smith *v.* Swift, 8 Met. 329; Nickerson *v.* Mason, 13 Wend. 64.

8 The Alaska, 3 Ben. 392; The Robert J. Mercer, 1 Sprague, 284; Banta *v.* McNeil, 5 Ben. 76; Ex parte McNiel, 13 Wall. 242; The George S. Wright, Deady, 537; Steamship Co. *v.* Joliffe, 2 Ware, 450.

9 The General Cass, 1 Brown Adm. 341; S. C. 5 Am. L. T. 12; The Detroit, 1 Brown, 141; The W. J. Welsh, 5 Ben. 74; The Kate Tremaine, 5 Ben. 60; S. C. 4 Am. L. T. 92; The Sarah Jane, 2 Am. Law Rev. 455; The Belfast, 7 Wall. 624; New England Mut. Mar. Ins. Co. *v.* Durham, 11 Wall. 1; The Celestine, 1 Biss. 3; Davis *v.* Child, 2 Ware, 74; Macy *v.* Dewolf, 3 Wood. & M. 203; People's Ferry Co. *v.* Beers, 20 How. 402.

§ 89. Divestment of State liens.—The lien on a domestic ship is lost by allowing it to proceed to sea,[1] and in some States after the lapse of twelve days after departure.[2] The lien of material-men ceases when the vessel leaves the State upon a voyage, or employment in the pursuit of trade or business,[3] but it is not lost by a short excursion, nor by being driven into a port out of the State,[4] nor by leaving the State fraudulently or clandestinely, as on a Sunday, or while labor is still in progress.[5] Liens under State laws are not lost by the transfer of the vessel or the change of her master.[6]

1 Johnson *v.* McDonough, Gilp. 103; Packard *v.* The Louisa, 2 Wood. & M. 63; Leland *v.* The Medora, 2 Wood. & M. 98; Spring *v.* S. C. Ins. Co. 8 Wheat. 268; Leonard *v.* Huntington, 15 Johns. 290; James *v.* Bixby, 11 Mass. 34; Stewart *v.* Hall, 2 Dow, 29.

2 The Alida, Abb. Adm. 170, distinguishing Denison *v.* The Appolonia, 20 Johns. 194; The Joseph E. Coffee, Olcott, 405; Hancox *v.* Dunning, 6 Hill, 494.

3 The Alida, Abb. Adm. 172; Hancox *v.* Dunning, 6 Hill, 494.

4 The Sam Slick, 1 Sprague, 262; Hancox *v.* Dunning, 6 Hill, 494.

5 The Joseph E. Coffee, Olcott, 407; Hancox *v.* Dunning, 6 Hill, 494.

6 Davis *v.* A New Brig, Gilp. 473.

11 Francis *v.* The Harrison, 1 Sawy. 373; The Circassian, 1 Ben. 128

12 The Highlander, 4 Blatchf. 55.

13 Stocker *v.* Cotlett, 3 Brev. 236.

14 Size *v.* Curtis, 1 Low. 110.

§ 91. Lien for wharfage.—Under the general maritime law a lien for wharfage does not attach.[1] In the absence of an agreement, the wharfinger is entitled to just and reasonable compensation for the use of his wharf.[2] As against a foreign vessel a lien attaches for wharfage, which is enforceable in admiralty *in rem*, or by a libel *in personam* against the owner.[3] Ancient codes usually treat such contracts as maritime for which the ship or vessel is liable;[4] such charges constitute a lien;[5] they are the subjects of admiralty jurisdiction.[6]

1 The Gem, 1 Brown, 37; Gardner *v.* The New Jersey, 1 Pet. Adm. 223; The Empire State, Newb. 541; Delaware Riv. Storage Co. *v.* The Thomas, 16 Int. Rev. Rec. 147; Ex parte Lewis, 2 Gall. 484; Naylor *v.* Mangles, 1 Esp. 109; Spears *v.* Hartley, 3 Esp. 81; Savill *v.* Burchard, 4 Esp. 53; Anonymous, Yel. 485; Brennan *v.* Current, Sayer, 224; Collins *v.* Ongley, Seld. N. P. 1388.

2 Ex parte Easton, 95 U. S. 68; The Jerusalem, 9 Gall. 191; S. C. Ex parte Lewis, 2 Gall. 483; Marshall *v.* The Vicksburg, 15 Wall. 146; The Kate Tremaine, 5 Ben. 60; Phebe, 1 Ware, 263; Nicoll *v.* Gardner, 13 Wend. 288; The Harrison, 2 Abb. U. S. 74; The Highlander, 1 Sprague, 540; Spring *v.* S. C. Ins. Co. 8 Wheat. 268; Johnson *v.* McDonough, Gilp. 105; Davis *v.* Child, 5 Ben. 68.

3 Ex parte Easton, 95 U. S. 68; Ex parte Lewis, 2 Gall. 484; Spears *v.* Hartley, 3 Esp. 81.

4 Maggie Hammond, 9 Wall. 435; De Lovio *v.* Bort, 2 Gall. 398; Ex parte Easton, 95 U. S. 76.

5 Gardner *v.* The New Jersey, 1 Pet. Adm. 223; Ex parte Lewis, 2 Gall. 485; Ex parte Easton, 95 U. S. 76; Johnson *v.* McDonough, Gilp. 101.

6 The Phebe, 1 Ware. 265; The Alaska, 3 Ben. 391; Hobart *v.* Drogan, 10 Peters, 108; The Mercer, 1 Sprague, 284; The Ann Ryan, 7 Ben. 29; Ex parte Easton, 95 U. S. 76.

the vessel, but gives a claim on her which may be enforced in admiralty.[9] They are not in the purview of the statutes requiring a record of mortgages of personal property.[10] They do not require possession to be taken.[11]

1 The Grapeshot, 9 Wall. 135; Carrington *v.* Pratt, 18 How. 67; S. C. 1 Curt. 340; The Atlas, 2 Hagg. Adm. 57.

2 De Lovio *v.* Bort, 2 Gall. 475; Watson *v.* Clark, 1 Dow. 336; Smith *v.* Macneil, 2 Dow, 538.

3 The Draco, 2 Sum. 176; Simonds *v.* Hodgson, 3 Barn. & Adol. 57; The Huntley, 1 Lush. 24; The Atlas, 2 Hagg. Adm. 49; Scarborough *v.* The Lyrus, Latch, 252; Noy, 65; The Cognac, 2 Hagg. Adm. 377; The Zodiac, 1 Hagg. Adm. 320; The Heart of Oak, 1 W. Rob. 204; Sharpley *v.* Hurrel, Cro. Jac. 208.

4 Stainbank *v.* Sheppard, 13 Com. B. 418.

5 The Draco, 3 Sum. 157; Thorndike *v.* Stone, 1 Pick. 183; Eneas *v.* The Charlotte Minerva, 30 Hunt's Mer. Mag. 73; The Atlas, 2 Hagg. Adm. 48; Greely *v.* Smith, 3 Wood. & M. 257; The Aline, 1 W. Rob. 111; The Grapeshot, 9 Wall. 135; The Trident, 1 W. Rob. 29.

6 Carrington *v.* Pratt, 18 How. 617; S. C. 1 Curt. 340; Leland *v.* The Medora, 2 Wood. & M. 108; The Irena, 6 Ben. 4; Greely *v.* Smith, 3 Wood. & M. 248; The Aurora, 1 Wheat. 96; The Highlander, 2 W. Rob. 109; Bray *v.* Bates, 9 Met. 237; The Atlas, 2 Hagg. Adm. 49.

7 The Draco, 2 Sum. 157; Thorndike *v.* Stone, 11 Pick. 183; Stainbank *v.* Sheppard, 13 Com. B. 418; Cole *v.* White, 26 Wend. 511; The Atlas, 2 Hagg. Adm. 48.

8 Robertson *v.* United Ins. Co. 2 Johns. Cas. 250; S. C. 1 Amer. Dec. 166.

9 Blaine *v.* The Charles Carter, 4 Cranch, 328; U. S. *v.* The Delaware Ins. Co. 4 Wash. C. C. 418; The Young Mechanic, 2 Curt. 404; Johnson *v.* Shippen, 2 Ld. Raym. 982; Johnson *v.* Greaves, 2 Taunt. 344; The Tobago, 5 C. Rob. 218.

10 The Prince of Saxe Coburg, 3 Hagg. Adm. 387; S. C. 3 Moore P. C. 1; The Mary Ann, 4 No. of Cas. 379; The Rebecca, 5 C. Rob. 102; The Osmanli, 3 W. Rob. 198. And see Rev. Stats. sec. 4192.

11 The Draco, 2 Sum. 157; Fontaine *v.* Beers, 19 Ala. 722.

§ 93. Marine risk essential.—The essential quality of a loan on bottomry is that repayment is dependent upon the safety of the vessel on which the loan is made, and that the lender should run the hazard of the voyage.[1] The marine risk is essential to its validity,[2] if there is a marine risk clearly stated, it is sufficient.[3] The risk must be such as justifies marine interest.[4] Where the payment is to be made "after arrival at a safe anchorage, or in case of loss, such an average as shall by custom become due on the salvage," a sea risk is expressed.[5] Where the maritime risk is excluded, it is void.[6] The debt and interest are both to be risked on the loss of the vessel.[7]

1 The Atlantic, 1 Newb. 514; The Mary, 1 Paine, 671; Greely *v.* Smith, 3 Wood. & M. 253; The Augusta, 1 Dods. 283, 466; The Woodland, 7 Ben. 116; Stainbank *v.* Fenning, 6 Eng. L. & E. 412; The Atlas, 3 Hagg. Adm. 49; Browne *v.* Arbuckle, 1 Wash. C. C. 484; Northwestern Ins. Co. *v.* Forward, 36 N. Y. 139; Thorndike *v.* Stone, 11 Pick. 187; Greely *v.* Wat-

3 The Mary, 1 Paine, 671. But see Greely v. Smith, 3 Wood. & M. 236.

4 The Hunter, 1 Ware, 249; The Packet, 3 Mason, 255; Wilmer v. The Smilax, 2 Pet. Adm. 295; La Ysabel, 1 Dods. 293; The Zodiac, 1 Hagg. Adm. 320; The Cognac, 2 Hagg. Adm. 397; The Boddingtons, 2 Hagg. Adm. 422; The Lord Cochrane, 2 W. Rob. 320.

5 Greely v. Smith, 3 Wood. & M. 236; The Atlas, 2 Hagg. Adm. 49.

6 The Virginia, 8 Peters, 538; The Ann C. Pratt, 1 Curt. 340; S. C. 18 How. 63; The William and Emmeline, 1 Blatchf. & H. 66; The Hunter, 1 Ware, 249; The Atlantic, Newb. 514; Leland v. The Medora, 2 Wood. & M. 92; The Mary, 1 Paine, 671; Greely v. Smith, 3 Wood. & M. 268; Jennings v. Ins. Co. of Penn. 4 Binn. 244; Stainbank v. Fenning, 6 Eng. L. & E. 412; The Emancipation, 1 Ibid. 124; Brown v. Arbunkle, 1 Wash. C. C. 484. But see Selden v. Hendrickson, 1 Brock. 396.

§ 95. Authority of owner.—The owner of a vessel may hypothecate it or its freightage, upon bottomry, for any lawful purpose,[1] and at any time and place.[2] The loan should be for advances connected with the vessel.[3] It may be given in any place where the owner has no personal credit, nor any goods of his own or of the master;[4] in a foreign port,[5] or at the home port of the vessel.[6] When made abroad, they are generally made on the next voyage;[7] when made at the home port, they are frequently made on time.[8] Where the owner is also master he may give a bottomry bond.[9] Necessity is not a prerequisite to the right of the owner to hypothecate.[10] It may be given as collateral security for a personal obligation.[11]

1 The Draco, 2 Sum. 157; The Mary, 1 Paine, 671; Leland v. The Medora, 3 Wood. & M. 106; Greely v. Smith, Ibid. 254; Greely v. Waterhouse, 19 Me. 9; Thorndike v. Stone, 11 Pick. 183; The Duke of Bedford, 2 Hagg. Adm. 294; The Augusta, 1 Dods. 283, 466.

2 The Mary, 1 Paine, 671; The Draco, 2 Sum. 157.

3 Greely v. Smith, 3 Wood. & M. 253.

4 Turnbull v. The Enterprise, Bee, 345; Forbes v. The Hannah, Bee, 348; Canizares v. The Santissima Trinidad, Bee, 353; Rucker v. Conyngham, 2 Pet. Adm. 295.

5 The Mary, 1 Paine, 671; The Draco, 2 Sum. 157; The Panama, Olcott, 344; The Barbara, 4 C. Rob. 1; The Duke of Bedford, 2 Hagg. Adm. 294.

6 Vandewater v. The Yankee Blade, McAll. 13; The Mary, 1 Paine, 671; Wilmer v. The Smilax, 2 Pet. Adm. 295; The Panama, Olcott, 343; The Draco, 2 Sum. 157; Thorndike v. Stone, 11 Pick. 183; Greely v. Waterhouse, 19 Me. 1.

7 The Jane, 1 Dods. 461.

8 Bray v. Bates, 9 Met. 237; Thorndike v. Stone, 11 Pick. 183; The Draco, 2 Sum. 157.

9 The Panama, Olcott, 343.

10 Eneas v. The Charlotte Minerva, 39 Hunt's Mer. Mag. 73; The St. Lawrence, 3 Ware, 214; The Panama, Olcott, 348; Wilmer v. The Smilax, 2 Pet. Adm. 295; The Draco, 2 Sum. 157; The Barbara, 4 C. Rob. 1; The Mary, 1 Paine, 675. But see Tod v. The Sultana, 19 How. 362.

11 The Emancipation, 1 W. Rob. 124; The Augusta, 1 Dods. 283.

§ 96. Authority of master.—The master has authority to hypothecate the vessel by bottomry bond in case of necessity, but only in a foreign port,[1] an urgent necessity,[2] although the necessity was created by his own fault;[3] but for this purpose the ports of each State are deemed foreign to each other.[4] The power belongs to the master, however appointed,[5] as when appointed by an American consul in a foreign port,[6] or by the agent of the owners,[7] or by the consignee of the cargo,[8] or by a foreign merchant,[9] so the master of a bankrupt hired by government may bottom her,[10] or of a belligerant ship, by virtue of a cartel;[11] but it is discharged by capture.[12] The master may hypothecate in a foreign country, though the voyage is broken up by capture and compulsory sale of the cargo for advances to enable him to return,[13] or for supplies.[14] He is authorized to hypothecate when he is unable to reach funds of the owners, or to obtain necessaries or advances on their personal credit,[15] or when communication with these is precluded,[16] and this, whether in a domestic or a foreign port.[17] The master may hypothecate for advances;[18] but he has no authority to do so, unless repayment is made to depend upon the safe arrival of the vessel, independent of the personal credit of the owners.[19] The master of a steamboat may give a bottomry bond,[20] to take up money, to pay services of a clerk,[21] or to pay wages.[22] The authority of the master extends to a hypothecation of the freightage.[23] When the master has ceased to act as such, his authority ceases.[24]

1 Burke *v.* The M. P. Rich, 1 Cliff. 308; Joy *v.* Allen, 2 Wood. & M. 303; Naylor *v.* Baltzell, Tanney, 55; Thomas *v.* Osboru, 19 How. 22; The Grapeshot, 9 Wall. 129; The Williams, 1 Brown Adm. 225; Boreal *v.* The Golden Rose, Bee, 131; Sloan *v.* A. E. I. Ibid. 250; Turnbull *v.* The Enterprise, Ibid. 345; The Bold Buccleugh, 2 Eng. L. & E. 536; The Alexander, 1 Dods. 278; The Orelia, 3 Hagg. Adm. 75; The Maitland, 2 Biss. 203; The Zodiac, 1 Hagg. Adm. 320; The Nuova Leonese, 22 Eng. L. & E. 623.

2 O'Hara *v.* The Mary, 100; Perkins *v.* Currier, 3 Wood. & M. 82; Bryant *v.* Am. Ins. Co. 13 Pick. 543.

3 Descadillos *v.* Harris, 8 Me. 298.

4 Burke *v.* The M. P. Rich, 1 Cliff. 308; Selden *v.* Hendrickson, 1 Brock. 396; The William and Emmeline, Blatchf. & H. 72; The Rhadamanthe, 1 Dods. 201.

5 The Orelia, 3 Hagg. Adm. 75; The Boston, Blatchf. & H. 309.

6 Cowan *v.* The Jacmel Packet, 2 Ben. 107; S. C. 7 Int. Rev. Rec. 108; The Nuova Leonese, 22 Eng. L. & E. 623; The Zodiac, 1 Hagg. Adm. 320; The Cynthia.

7 The Annersley Castle, 3 Hagg. Adm. 1.

8 The Alexander, 1 Dods. 278; The Rubicon, 3 Hagg. Adm. 9.

9 Carrington *v.* Pratt, 18 How. 63; S. C. 1 Curt. 340; The Tartar, 1 Hagg. Adm. 1.

10 The Jane, 1 Dods. 461.

11 Crawford v. The William Penn, Pet. C. C. 106; 3 Wash. C. C. 484.

12 The Tobago, 5 C. Rob. 218.

13 The Robert L. Lane, 1 Low. 388; The Rhadamanthe, 1 Dods. 201; Murray v. Lazarus, 1 Paine, 572; The Packet, 3 Mason, 255; Ross v. The Active, 2 Wash. C. C. 226; The Aurora, 1 Wheat. 96.

14 Crawford v. The William Penn, 3 Wash. C. C. 484; The Fortitude, 3 Sum. 255; The Grapeshot, 9 Wall. 143; The Boston, Blatchf. & H. 325; Amer. Ins. Co. v. Coster, 3 Paige, 325.

15 The Virgin, 8 Peters, 538; The William and Emmeline, Blatchf. & H. 73; Tunno v. The Mary, Bee, 120; The Packet, 3 Mason, 255; Ross v The Active, 2 Wash. C. C. 226; Walden v. Chamberlain, 3 Ibid. 290; The Medora, 1 Sprague, 138; The Saxe Coburg, 3 Hagg. Adm. 387; Forbes v. The Hannah, Bee, 343; Pope v. Nickerson, 3 Story, 478.

16 Arthur v. Barton, 6 Mees. & W. 138; La Ysabel, 1 Dods. 273; The Circassian, 3 Ben. 418; The Oriental, 7 Moore P. C. 398.

17 The Trident, 1 Wm. Rob. 29.

18 Pope v. Nickerson, 3 Story, 500; The Fortitude, 3 Sum. 228; The Gratitudine, 3 C. Rob. 240.

19 Stainbank v. Fenning, 6 Eng. L. & E. 412; Thomas v. Osborn, 19 How. 28; Pope v. Nickerson, 3 Story, 465.

20 The New World v. King, 16 How. 469.

21 The Medora, 1 Sprague, 139; The Jacmel Packet, 2 Ben. 107; The Vibilia, 1 W. Rob. 1; S. C. 2 Hagg. Adm. 228; The Gauntlet, 3 W. Rob. 82.

22 The Medora, 1 Sprague, 139; The Trident, 1 W. Rob. 29.

23 The Packet, 3 Mason, 255; The Zephyr, Ibid. 341; Ward v. Green, 6 Cow. 173.

24 Walden v. Chamberlain, 3 Wash. C. C. 290.

§ 97. Necessity the test of master's authority.— The master cannot hypothecate except in case of great distress, with no other means of relief,[1] the inability to obtain the money in any other way.[2] In case of necessity the master may hypothecate at the port of destination, as at any other port.[3] The necessity must be absolute to enable the master to prosecute the voyage,[4] or for the safety and security of the vessel.[5] As to necessity, whatever is reasonable and just is legal;[6] that is a sufficient necessity, where the circumstances of exigency are such as would induce a prudent owner to order the necessaries.[7] Where the voyage is necessarily abandoned, he may hypothecate.[8] The necessity creates the law.[9]

1 The Grapeshot, 9 Wall. 129; Tunno v. The Mary, Bee, 120; Patton v. The Randolph, Gilp. 457; The Draco, 2 Sum. 157; Crawford v. The William Penn, 3 Wash. C. C. 484; Furniss v. The Magoun, Olcott, 55; Doddington v. Hallet, 1 Ves. Sr. 497.

2 Burke v. The M. P. Rich, 1 Cliff. 308; The Packet, 3 Mason, 255; The Lavonia v. Barclay, 1 Wash. 40; Rucher v. Conyngham, 2 Pet. Adm. 295; Hurry v. Hurry, 2 Wash. C. C. 148; Pope v. Nickerson, 3 Story, 478; The Fortitude, 3 Sum. 228.

3 Reade v. Commercial Ins. Co. 3 Johns. 352.

4 The Aurora, 1 Wheat. 96; Gibbs v. The Texas, Crabbe, 236; The Boston, Blatchf. & H. 309; Walden v. Chamberlain, 3 Wash. 290;

Rucher v. Conyngham, 2 Pet. Adm. 295; The Sarah Ann, 2 Sum. 215; Patton v. The Randolph, Gilp. 457; Pope v. Nickerson, 3 Story, 478.

5 The Aurora, 1 Wheat. 96; The Boston, Blatchf. & H. 309.

6 The Gratitudine, 3 C. Rob. 196; The Nelson, 1 Hagg. Adm. 169; The Rhadamanthe, 1 Dods. 201; The Gauntlet, 3 W. Rob. 82.

7 The Grapeshot, 9 Wall. 128; The Medora, 1 Sprague, 138; The Fortitude, 3 Sum. 228; Thomas v. Gittings, Taney, 472; Webster v. Seekamp, 4 Barn. & Ald. 352.

8 The Robert L. Lane, 1 Low, 390; The Nelson, 1 Hagg. Adm. 169.

9 The Circassian, 3 Ben. 416; The Gratitudine, 3 C. Rob. 240.

98. Restriction on authority of master.—The master cannot hypothecate, if he has money on board sufficient for the ship's expenses;[1] but he is not bound to take the money on board which belongs to the shippers.[2] When the master has funds in his hands of the owners, or within his control,[3] or can by any means procure them, either on his own or the owner's credit,[4] or by advances on freight, or by passage money, he is not authorized to bottom the vessel.[5] He has no authority if any consignee or agent of the owner be present with funds,[6] or a part owner,[7] or can be communicated with by telegraph.[8] If the owner be present, the bond is valid only by reason of his implied assent.[9] Where there was a consignee to give credit and make advances, this circumstance repels the necessity for hypothecation, either express or implied.[10] He has no authority to hypothecate, if he has goods of his own on board, and could raise money thereon,[11] otherwise if he could not raise the money.[12] He cannot hypothecate merely to secure or pay pre-existing debts;[13] but he may bottom the ship to liberate her from arrest and sale for an antecedent debt, but not for a mere threat of arrest.[14] He cannot hypothecate the vessel and freight, and the cargo also, so as to bind the owners,[15] nor for money for his own use,[16] nor pledge the freight,[17] nor can he hypothecate for the benefit of the cargo.[18]

1 The William and Emmeline, Blatchf. & H. 73; Boreal v. The Golden Rose, Bee, 131; The Packet, 3 Mason, 255; Walden v. Chamberlain, 3 Wash. C. C. 290.

2 The Packet, 3 Mason, 255.

3 The William and Emmeline, Blatchf. & H. 73; Walden v. Chamberlain, 3 Wash. C. C. 290; Boreal v. The Golden Rose, Bee, 131; Forbes v. The Hannah, Bee, 348; Cupisino v. Perez, 2 Dill. 194; The Packet, 3 Mason, 255; The Fortitude, Blatchf. & H. 320; Joy v. Allen, 2 Wood. & M. 328; The Zodiac, 1 Hagg. Adm. 320; The Sydney Cove, 2 Dods. 11; The Hero, 2 Dods. 139; The Gustavia, Blatchf. & H. 192; The Alexander, 1 Dods. 278.

4 The Atlantic, Newb. 518; The Hunter, 1 Ware, 254; Rucher v. Conyngham, 2 Pet. Adm. 296; The Fortitude, 3 Sum. 257; Ross v. The Active, 2 Wash. C. C. 226; Leland v. The Medora, 2 Wood. & M. 98; The Houghton, 3 Hagg. Adm. 100; The Prince of Saxe Coburg, 3 Hagg. Adm. 337; The Hero, 2 Dods. 139; The Rhadamanthe, 1 Dods. 201.

5 The Aurora, 1 Wheat. 96; The Eledona, 2 Ben. 37; Burke v. The M. P. Rich, 1 Cliff. 314; Furniss v. The Magoun, Olcott, 62; Leland v. The Medora, 2 Wood. & M. 107; Thomas v. Osborn, 19 How. 22; The Hersey, 3 Hagg. Adm. 404.

6 Tunnis v. The Mary, Bee, 120; Putnam v. The Polly, Ibid. 157; Sloan v. The A. E. I. Ibid. 250; Canizares v. The Santissima Trinidad, Bee, 353; Hopk. 185; Rucher v. Conyngham, 2 Pet. Adm. 295; The Lavinia v. Barclay, 1 Wash. C. C. 49; Patton v. The Randolph, Gilp. 457; The Nelson, 1 Hagg. Adm. 169; The Rhadamanthe, 1 Dods. 201; The Medora, 1 Sprague, 138; The Circassian, 3 Ben. 398.

7 Patton v. Randolph, Gilp. 457; Selden v. Hendrickson, 1 Brock. 396; The Lavinia v. Barclay, 1 Wash. C. C. 49.

8 Agricultural Bank v. The Jane, 19 La. 1; The Wave, 4 Eng. Law & Eq. 589; The Nuova Leonese, 22 Eng. L. & E. 623; The Hamburg, Brown & L. 273; Wilkinson v. Wilson, 8 Moore P. C. 459; 36 Eng. L. & E. 62; The Lochiel, 2 W. Rob. 34; Wallace v. Fielden, 7 Moore P. C. 398, reversing The Oriental, 3 W. Rob. 243; 2 Eng. L. & E. 546.

9 The Panama, Olcott, 348; Patton v. The Randolph, Gilp. 457; The Mary, 1 Paine, 671; The Aurora, 1 Wheat. 96.

10 Leland v. The Medora, 2 Wood. & M. 92; Tunno v. The Mary, Bee, 120.

11 Canizares v. The Santissima Trinidad, Bee, 353; Cupisino v. Perez, 2 Dall. 194.

12 The William and Emmeline, Blatchf. & H. 66.

13 The Aurora, 1 Wheat. 96; Hurry v. The John and Alice, 1 Wash. C. C. 293; Walden v. Chamberlain, 3 Ibid. 230; Sloan v. The A. E. I. Bee, 250; The Hunter, 7 Ware, 254; Baldwin v. Campbell, 6 Ex. 886; 6 Eng. L. & E. 473; Patton v. The Randolph, Gilp. 457; Smith v. Gould, 4 Moore P. C. 21; The Lochiel, 2 W. Rob. 34; The Osmanli, 3 Ibid. 198; Clark v. Laidlaw, 4 Ibid. 345; Leland v. The Medora, 2 Wood. & M. 115; Greely v. Smith, Ibid. 253; Boreal v. The Emperor, Bee, 239; The Virgin, 8 Peters, 538; Greeley v. Waterhouse, 19 Mo. 9; Hurry v. Hurry, 2 Wash. C. C. 145; The Hero, 2 Dods. 139; The Mary, 1 Paine, 671.

14 The Aurora, 1 Wheat, 96; The Boston, Blatchf. & H. 324; The Vibilia, 1 W. Rob. 1. And see The Osmanli, 3 W. Rob. 198; The Yuba, 4 Blatchf. 352.

15 Naylor v. Baltzell, Taney, 65; The Packet, 3 Mason, 255.

16 Gibbs v. The Texas, Crabbe, 236; Fox v. Holt, 4 Ben. 291; Joy v. Allen, 3 Wood. & M. 328; Keith v. Murdock, 2 Wash. C. C. 297; Fox v. Holt, 4 Ben. 291; Joy v. Allen, 2 Wood. & M. 328.

17 Keith v. Murdock, 2 Wash. C. C. 297.

18 Fontaine v. Cal. Ins. Co. 9 Johns. 29.

§ 99. To whom bond may be given.—There are cases in which an agent may take a bottomry bond[1] or a consignee,[2] but he cannot lend his own money if he has funds in his hands belonging or due to the owners;[3] he is bound to see that a necessity exists.[4] The owner of the cargo may take a bottomry bond;[5] but part owners or ship's husband of the vessel cannot take a bottomry bond on the shares of the other part owners.[6] The bond may be given by the owner in a foreign port, to the master, to secure advances and wages due him.[7] The court may refuse to enforce the bond, where the libellant had abandoned the character of consignee, employing the vessel without accounting for her earnings.[8]

1 The Oriental, 2 Eng. L. & E. 546; Reade & Commer. Ins. Co. 3 Johns. 352; S. C. 3 Amer. Dec. 495; Furniss v. The Magoun, Olcott, 62; The Jane, 1 Dods. 461; The Tartar, 1 Hagg. Adm. 1; The Zodiac, Id. 320; The Eliza Jane, 1 Sprague 155, denying The Packet, 3 Mason, 255; The Emperor, Bee, 339. And see The Hero, 2 Dods. 139.

2 Gardner v. The New Jersey, 1 Pet. Adm. 223; Lavinia v. Barclay, 1 Wash. C. C. 49; Ross v. The Active, 2 Id. 226; Rucher v. Conyngham, 2 Pet. Adm. 296; The Eliza Jane, 1 Sprague, 155; Furniss v. The Magoun, Olcott, 62; The Nuova Leonese, 22 Eng. L. & E. 623; The Alexander, 1 Dods. 278; The Hero, 2 Ibid. 139; The Nelson, 1 Hagg. Adm. 169; The Zodiac, 1 Hagg. Adm. 320; The Lord Cochrane, 2 W. Rob. 320; The Oriental, 3 Ibid. 243; Reade v. Com. Ins. Co., 1 Ware, 254, denying The Emperor, Bee, 339.

3 Hurry v. The John & Alice, 1 Wash. C. C. 293; The Lavinia v. Barclay, 1 Wash. C. C. 49; Ross v. The Active, 2 Ibid. 226; Read v. Commercial Ins. Co. 3 Johns. 352; The Eliza Jane, 1 Sprague, 155.

4 The Royal Arch, 2 Spinks Adm. 258; S. C. 33 Eng. L. & E. 602.

5 The Eliza Jane, 1 Sprague, 155; Ross v. The Active, 2 Wash. C. C. 226.

6 The Larch, 2 Curt. 433; Patton v. The Randolph, Gilp. 457; Mumford v. Nicoll, 4 Johns. Ch. 526; S. C. 20 Johns, 611; Lamb v. Durant, 12 Mass. 54; Merrill v. Bartlett, 6 Peck, 46; Braden v. Gardner, 4 Peck, 456; French v. Price, 24 Pick, 14; Ex parte Young, 2 Ves. & B. 242; 2 Rose, 72, note, overruling Doddington v. Hallet, 1 Ves. Jr. 497.

7 The Panama, Olcott, 343; Conard v. Atlantic Ins. Co. 1 Pet. 386; Franklin Ins. Co. v. Lord, 4 Mason, 248.

8 Clark v. The Leopard, 4 Law Rep. 153.

§ 100. Construction of contract.—A bottomry bond is to be construed liberally, so as to carry into effect the intention of the parties.[1] The law implies that the ship is not to be made over to any other use and purpose, and this need not be stated in the bond.[2] The words "utter loss of the ship" mean an actual total loss,[3] and the words "lost or not lost" if omitted, may be supplied by other equivalent expressions.[4] Where a bottomry bond is given to secure a past indebtedness, it may be regarded as a new loan on bottomry.[5] The bond does not necessarily include the freight,[6] but it may be included,[7] and it may include all the freight of the whole voyage[8] which has not been paid to the master or owner.[9] When the freight is pledged, the presumption is that it means the freight to be earned in the course of the voyage.[10] The form and operation of a bottomry bond is controlled by local law.[11]

1 The Zephyr, 3 Mason, 341; Pope v. Nickerson, 3 Story, 465; Simonds v. Hodgson, 3 Barn. & Adol. 50; The Alexander, 1 Dods. 278; The Rhadamanthe, Ibid. 201; The Hero, 2 Ibid. 139; The Calypso, 3 Hagg. Adm. 162; The Reliance, Ibid. 66.

2 The Draco, 2 Sum. 157.

3 Insurance Co. of Penn. v. Duval, 8 Serg. & R. 138

4 Atlantic Ins. Co. v. Conard, 4 Wash. C. C. 662.

5 Greely v. Waterhouse, 19 Me. 1.

6 The Draco, 2 Sum. 157; Crawford v. The William Penn, 3 Wash. 34; La Constancia, 4 Notes of Cas. 286; The Mary Ann, Ibid. 378.

7 Murray v. Lazarus, 1 Paine, 572; The Packet, 3 Mason, 255; The Augusta, 1 Dods. 283; The Nelson, 1 Hagg. Adm. 169; The Gratitudine, 3 C. Rob. 240.

8 The Zephyr, 3 Mason, 341; The Duwthorpe, 2 W. Rob. 73; and see the Jacot, 4 C. Rob. 245; The Eliza, 3 Hagg. Adm. 57.

9 The John, 3 W. Rob. 170; The Cynthia, 20 Eng. L. & E. 625.

10 The Zephyr, 3 Mason, 341.

11 The Draco, 2 Sum. 186; The Zodiac, 1 Hagg. Adm. 320; The Nelson, Ibid. 169.

§ 101. What may be tacked on.—A bottomry creditor may, by paying seamen's wages, entitle himself to a novation in their place for the recovery of their demands against the vessel.[1] So advances made for indispensable repairs and supplies to relieve the ship may be included.[2] A charge for commissions in procuring the loan is proper, as incidental to the loan itself.[3] A stipulation that the cost of insurance may be included will not invalidate the bond.[4]

1 The Virgin, 8 Pet. 538; The Cabot, 1 Abb. Adm. 150; Kammerhevie v. Rosenkrantz, 1 Hagg. Adm. 62.

2 Miller v. The Snow Rebecca, Bee, 151.

3 The Yuba, 4 Blatchf. 352.

4 The Robert L. Lane, 1 Low. 390; The Rhadamanthe, 1 Dods. 201.

§ 102. As a negotiable instrument.—It is in general considered a negotiable instrument, enforceable by the holder in his own name,[1] but only in a qualified sense.[2] The lien is not lost by assignment,[3] even to the agent of the owners who bought it with their own money,[4] and is not affected by the assignee of the bond taking a mortgage on the vessel.[5]

1 The Prince of Saxe Coburg, 3 Hagg. Adm. 287; S. C. 3 Moore, P. C. 1; The Mary Ann, 4 No. of Cas. 379; The Rebecca, 5 C. Rob. 102; The Osmanli, 3 W. Rob. 198.

2 Burke v. The M. P. Rich, 1 Cliff. 313; Thompson v. Dominy, 14 Mees. & W. 403.

3 Johnson v. The Belle of the Sea, 15 Int. Rev. Rec. 146.

4 Johnson v. The Belle of the Sea, 15 Int. Rev. Rec. 146.

5 Burke v. The M. P. Rich, 1 Cliff. 308.

§ 103. Bond with collateral security.—When a bond is given with collateral securities for debts due, that fact may be shown, notwithstanding the recital that it is given for advances.[1] Simple contract securities for which it is given are merged in the bond.[2] The bond may be accompanied by collaterals, as a bill of exchange.[3] Where a bill is drawn and a bottomry at the same time, the bill

must share the fate of the bond.[4] It is no discharge of the lien created by the bond.[5] The payment of one extinguishes both.[6] It is valid, although a note or other obligation is also given for the demand.[7]

1 Greely *v.* Waterhouse, 19 Me. 1.

2 Bray *v.* Bates, 9 Met. 237.

3 The Hunter, 1 Ware, 252; Greely *v.* Smith, 3 Wood. & M. 252; The Atlantic, Newb. Adm. 520.

4 The Atlantic, Newb. Adm. 520; The Jane, 1 Dods. 461; The Augusta, Ibid. 283, 466.

5 Leland *v.* The Medora, 2 Wood. & M. 100; The Hunter, 1 Ware, 252; The Augusta, 1 Dods. 256; The Jane, Ibid. 466; The Ariadne, 1 Wm. Rob. 411.

6 The Atlantic, Newb. Adm. 520; The Hunter, 1 Ware, 249.

7 The Hilarity, Blatchf. & H. 90.

§ 104. Validity of bonds.—A bottomry bond is not valid unless given to enable vessel to leave port, either for necessary repairs, or claims on her, there being no other means of getting the money.[1] Where the distress is admitted or established, the want of personal credit beyond question, and the bond apparently correct, the presumption of law is in favor of its validity,[2] and admiralty will support it as far as justice will admit, according to the principles of equity.[3] It is not material whether the supplies were directly furnished, or money advanced to pay for them.[4] A bond is valid, though the repairs were made or supplies furnished before the loan was effected,[5] if the original intention was to give the bond. It is not necessary that the loan or supplies should have been already received; the credit of the lender is a sufficient consideration, if given on the faith of the bottomry,[6] so the assumption by the obligee of certain debts due by the vessel is a sufficient consideration.[7] Nor is it an objection that the advances were made from time to time,[8] or that a part of the loan was a bill of exchange drawn on the home port of the vessel,[9] or that a bill of exchange was drawn for the same sum for which the bond was given.[10] The fraudulent practices of an owner or mortgagee, which might render the voyage illegal, do not invalidate a bond to a *bona fide* lender.[11] Its validity is not affected by the irregular conduct of the owner, if the lender be not privy thereto,[12] as where the money was used for other purposes than that of fitting out the vessel,[13] nor by any contract between the owners and charterers as to freight.[14] A bottomry bond given to pay a prior one must stand or fall with the first hypothecation.[15] A bottomry bond may be good in part and bad in part; in such case it is enforce-

able in admiralty for the part which is good,[16] and though it may be bad as a bottomry, it may yet be good as a mortgage, but not unless it be recorded,[17] and may be enforced at common law.[18] They are to be construed liberally for the benefit of the obligee.[19]

1 Gibbs *v.* The Texas, Crabbe, 236.

2 Greely *v.* Smith, 3 Wood. & M. 236; The Mary Ann, 4 Notes of C. 378; The Vibilia, 1 Wm. Rob. 1, explaining The Jacob, 4 C. Rob. 245.

3 Packard *v.* The Louisa, 2 Wood. & M. 48; The Cognac, 2 Hagg. Adm. 377; The St. Catherine, 3 Hagg. Adm. 250; The Mary Ann, 10 Jur. 253; 4 Notes of C. 376; Smith *v.* Gould, 4 Moore P. C. C. 28; The Trident, 1 Wm. Rob. 29; The Heart of Oak, Ibid. 204.

4 Thomas *v.* Osborn, 19 How. 22; The Gustavia, Blatchf. & H. 189; The Union Express, 1 Brown Ad. 539; The A. R. Dunlap, 1 Low. 361.

5 The Yuba, 4 Blatchf. 352; The Kathleen, 2 Ben. 458; Furniss *v.* The Magoun, Olcott, 55; The Panama, Ibid. 543; The Virgin, 8 Pet. 551; Hurry *v.* Hurry, 2 Wash. C. C. 145; The Panama, Olcott, 350; Burke *v.* The M. P. Rich, 1 Cliff. 315; La Ysabel, 1 Dods. 273. Otherwise it is bad; The Hunter, 1 Ware. 255; Rucher *v.* Conyngham, 2 Pet. Ad. 295.

6 The Panama, Olcott, 343; Duke of Bedford, 2 Hagg. Adm. 294; The Virgin, 8 Pet. 538; The Barbara, 4 C. Rob. 1.

7 Cohen *v.* The Amanda, Crabbe, 277.

8 The Virgin, 8 Pet. 538; Furniss *v.* The Magoun, Olcott, 55; The Aurora, 1 Wheat. 107.

9 The Panama, Olcott, 343; The Barbara, 4 C. Rob. 1.

10 The Hunter, 1 Ware, 249.

11 The Mary Ann, Law Rep. 1 Ad. & E. 13.

12 Canizares *v.* The Santissima Trinidad, Bee, 361; Wilmer *v.* The Smilax, 2 Pet. Ad. 300, note; The Virgin, 8 Pet. 538.

13 Greely *v.* Smith, 3 Wood. & M. 253; The Fortitude, 3 Sum. 228.

14 The Erie, 3 Ware, 230; Pitman *v.* Hooper, 3 Sum. 50.

15 The Aurora, 1 Wheat. 96; Walden *v.* Chamberlain, 3 Wash. 290; Dobson *v.* Lyall, 3 Jur. 969.

16 The Virgin, 8 Pet. 538; The Packet, 3 Mason, 255; The Bridgewater, Olcott, 35; Carrington *v.* Pratt, 18 How. 67; Furniss *v.* The Magoun, Ibid. 55; The Hunter, 1 Ware, 249; Greely *v.* Smith, 3 Wood. & M. 236; The Aurora, 1 Wheat. 107; La Ysabel, 1 Dods. 273; The Augusta, 1 Dods. 283, 466; The Tartar, 1 Hagg. Adm. 1; The Nelson, 1 Hagg. Adm. 169; The Gratitudine, 3 C. Rob. 240; The Hero, 2 Dods. 139.

17 Greely *v.* Smith, 3 Wood. & M. 252; Williams *v.* Steadman, Skin. 345; S. C., Holt, 126; The Atlantic, Newb. Adm. 518; The Hunter, 1 Ware, 249; Thorndike *v.* Stone, 11 Pick. 183.

18 Hurry *v.* Hurry, 2 Wash. C. C. 145; Hurry *v.* The John & Alice, 1 Wash. C. C. 297; The White Squall, 4 Blatchf. 103; Gardner *v.* The New Jersey, 1 Pet. 223; Samsun *v.* Braggington, 1 Ves. Sr. 443.

19 Greely *v.* Smith, 3 Wood. & M. 256; Pope *v.* Nickerson, 3 Story, 465; Simonds *v.* Hodgson, 3 Barn. & Adol. 58; The Emancipation, 1 Wm. Rob. 124. See *ante*, § 100.

8 The Bridgewater, Olcott, 36; The Aurora, 1 Wheat. 96; Crawford v. The William Penn, 3 Wash. C. C. 484; Hurry v. The John and Alice, 1 Wash. C. C. 293; Boreal v. The Golden Rose, Bee, 131; The William and Emmeline, Blatchf. & H. 76; Clark v. Laidlow, 4 Rob. (La.) 345.

9 Carrington v. Pratt, 18 How. 63; The Fortitude, 3 Sum. 254.

10 The Lulu, 1 Abb. U. S. 193; Chase, Dec. 164; The Fortitude, 3 Sum. 228; The Grapeshot, 9 Wall. 138; Furniss v. The Magoun, Olcott, 55; The Zodiac, 1 Hagg. Adm. 320; The Calypso, 3 Hagg. Adm. 162; The Nelson, 1 Hagg. Adm. 169.

11 The Fortitude, 3 Sum. 228.

12 The Grapeshot, 9 Wall. 138; The Lulu, 10 Wall. 192; The Kalorama, 10 Wall. 216. explaining Thomas v. Osborn, 19 How. 22; and Pratt v. Reed, 19 How. 359. And see The Maitland, 2 Biss. 205; The Sarah Starr, 1 Sprague, 458; The Eledona, 2 Ben. 33; The Neversink, 5 Blatchf. 540; The Sea Lark, 1 Sprague, 571; The Prospect, 3 Blatchf. 528.

§ 106. Burden of proof.—The necessity for repairs being shown, it is on the owner to show that the money could have been obtained otherwise than resorting to bottomry,[1] or that the master had funds of the owners.[2] If the owner of the cargo suffers it to be sold under the bottomry bond without requiring evidence of the necessity, it will not avail in an action against the owner of the vessel to show that the necessity did not exist.[3]

1 The Kathleen, 2 Ben. 458; The Grapeshot, 9 Wall. 138; The Virgin, 8 Peters, 538; The Phebe, 1 Ware, 263; The Fortitude, 3 Sum. 236, 264; The Lulu, 10 Wall. 192; The Nelson, 1 Hagg. Adm. 169; Patton v. The Randolph, Gilp. 460.

2 The Fortitude, 3 Sum. 228.

3 Naylor v. Baltzell, Taney, 55.

§ 107. When void.—If a bottomry bond be obtained by duress, it is void;[1] but a threatened lawsuit is not duress.[2] Where the bond was taken for a larger amount than was actually advanced, it was void.[3] A bond executed in a domestic port for money neither loaned for nor applied to the purposes of the voyage, cannot be enforced.[4] Where repairs are ordered or money advanced on personal credit of the owner, master, or agent, a bottomry bond will not be sustained,[5] but the instrument may be valid as a lien.[6] It is void if the voyage be lost by any accident within the conditions of the bond.[7] If a personal liability survives the loss of the vessel, the bond will not be good as a bottomry bond.[8] In such cases the owners are not personally bound beyond the extent of the fund pledged which comes into their hands.[9] When the marine interest is reserved and the risk excluded, the bond is void.[10]

1 The Heart of Oak, 1 Wm. Rob. 204; The Gauntlet, 3 Ibid. 82.

2 Forbes v. Appleton, 5 Cush. 115.

3 Carrington v. Pratt, 18 How. 63, affirming S. C. 1 Curt. 349.

4 Knight v. The Attila, Crabbe, 326.

249; Thorndike v. Stone, 11 Pick. 183; Greely v. Smith, 3 Wood & M. 251; Simonds v. Hodgson, 6 Bing. 114; S. C., 3 Barn. & Adol. 50; The Augusta, 1 Dods. 283, 466; The Tartar, Hagg. Adm. 1; The Nelson, Ibid. 169.

6 The Draco, 2 Sum. 176; The Hunter, 1 Ware, 249; Greely v. Smith, 3 Wood. & M. 249; Jordan v. White, 4 La. N. S. 335; The Nelson, 1 Hagg. Adm. 169; The Atlas, 2 Ibid. 49.

7 Stainbank v. Sheppard, 13 Com. B. 418; The Nelson, 1 Hagg. Adm. 169.

8 The Virgin, 8 Peters, 538.

§ 110. When due.—If a sale or transfer of the vessel takes place,[1] or the voyage is broken up in any manner by the borrower, the marine risk terminates;[2] so the bond becomes due and payable where the non-performance of the voyage has been occasioned by the fault or misconduct of the master or owner,[3] as the intentional loss of the vessel.[4] A bottomry or respondentia bond, conditioned to be void in case of "utter loss," is not discharged by the stranding and sale of the vessel, if it still exist in specie at the time of the sale.[5] The holder is entitled to the proceeds of the cargo saved.[6] If the ship be lost, no part of the money is to be repaid.[7] A loss not strictly total cannot be turned into a total loss by abandonment, so as to excuse the borrower from payment.[8] There is no salvage in bottomry.[9] The bond becomes due by a deviation,[10] but not a deviation from necessity.[11] It becomes payable when the voyage and adventure is broken up by a third party.[12] If a ship is captured and restored to the owner, it is a detention, and not a loss of the ship;[13] but if captured, condemned, and sold, it is a loss of the vessel.[14] Adjustment on general average will not prevent the enforcement of the bond.[15] Nothing short of an actual total loss will discharge the liability.[16]

1 The Draco, 2 Sum. 157.

2 The Draco, 2 Sum. 157.

3 Pope v. Nickerson, 3 Story, 465; The Draco, 2 Sum. 157; Greely v. Smith, 3 Wood. & M. 258; Wilmer v. The Smilax, 2 Pet. Adm. 295.

4 Pope v. Nickerson, 3 Story, 465; Thorndike v. Stone, 11 Pick. 183; Wallis v. Cook, 10 Mass. 510; The Catherine, 1 Eng. L. & E. 579; The Elephanta, 9 Ibid. 553; Thompson v. Royal Ex. Assu. Co. 16 East, 214; The Dante, 2 Wm. Rob. 427.

5 Del. Mut. Sa. Ins. Co. v. Gossler, 1 Holmes, 475.

6 Del. Mut. Sa. Ins. Co. v. Gossler, 1 Holmes, 475; Appleton v. Crowninshield, 3 Mass. 448.

7 The Draco, 2 Sum. 157; Thorndike v. Stone, 11 Pick. 183; Leland v. The Medora, 2 Wood. & M. 92; Rucker v. Conyngham, 2 Pet. Adm. 295; The William and Emmeline, Blatchf. & H. 66; The Atlantic, Newb. Adm. 514; Jennings v. Ins. Co. of Penn. 4 Binn. 244; Greely v. Waterhouse, 19 Me. 9; Bray v. Bates, 9 Met. 237; The Atlas, 2 Hagg. Adm. 48; The Emancipation, 1 Wm. Rob. 124.

8 Pope v. Nickerson, 3 Story, 465.

8 Robertson *v.* United Ins. Co. 2 Johns. Cas. 250; Joyce *v.* Williamson, 1 Doug. 164.

10 Harman *v.* Van Hatton, 2 Vt. 717; Wilmer *v.* The Smilax, 2 Pet. Adm. 294; Western *v.* Wildy, Skinn. 152; Williams *v.* Stedman, Skinn. 345.

11 The Armadillo, 1 Wm. Rob. 251.

12 Greely *v.* Smith, 3 Wood. & M. 236.

13 Joyce *v.* Williamson, 3 Doug. 164.

14 Appleton *v.* Crowninshield, 3 Mass. 441.

15 The Belle of The Sea, 20 Wall. 421; Pope *v.* Nickerson, 3 Story, 489; Joyce *v.* Williamson, 3 Doug. 164.

16 Pope *v.* Nickerson, 3 Story, 490; Thompson *v.* Royal Ex. Assu. Co. 16 East, 214.

§ 111. Priority of.—A bottomry bond is preferred to all other liens[1] except the lien for seamen's wages,[2] and for indispensable repairs and supplies;[3] and a later in date takes preference over a former bond;[4] yet if the property will not pay all, and they are really concurrent, they will be paid *pro rata*.[5] This privilege is confined to bonds given under the pressure of necessity, in a foreign port.[6] A bottomry lien created by the owner without necessity, or belief of necessity in the lender, has not a preference over a prior lien.[7] A bottomry bond takes precedence over a prior mortgage where possession was not taken.[8] The lien will be upheld even against a *bona fide* purchaser, where there are no laches.[9] It takes priority over the fund in court over any claim for a general average loss, subsequent to the date of the bond;[10] but sums advanced upon account of freight must be deducted in preference to the bottomry.[11] In the order of payment the claims of the master and bondholder are subject to the rule of priority of claim for seamen's wages.[12]

1 The Mary, 1 Paine, 671; The Duke of Bedford, 2 Hagg. Adm. 294; The Orelia, 3 Hagg. Adm. 75; The Hercules, Ibid. 404; The Mary Ann, 9 Jur. 94; The William F. Safford, Lush. Adm. 69; Collins *v.* The Fort Wayne, 1 Bond, 490; The Aline, 1 Wm. Rob. 111.

2 Blaine *v.* The Charles Carter, 4 Cranch, 328; The Virgin, 8 Pet. 538; The Hilarity, 1 Blatchf. & H. 90; Furniss *v.* The Magoun, Olcott, 55; The Madonna d'Idra, 1 Dods. 37; The Sydney Cove, 2 Dods. 1; La Constancia, 4 Notes of C. 512; The Louisa Bertha, 1 Eng. L. & E. 665; Pitman *v.* Hooper, 3 Sum. 59.

3 The Jerusalem, 2 Gall. 345.

4 The Aurora, 1 Wheat. 96; Greely *v.* Smith, 3 Wood. & M. 249; Leland *v.* The Medora, 2 Wood. & M. 113; Furniss *v.* The Magoun, Olcott, 66; The Draco, 2 Sum. 157; Thorndike *v.* Stone, 11 Pick. 183; The Betsy, 1 Dods. 289; Rhadamanthe, Ibid. 201; The Exeter, 1 Rob. Adm. 173; The Sydney Cove, 2 Dods. 1; The Eliza, 3 Hagg. Adm. 87; The Trident, 1 Wm. Rob. 29. And see La Constancia, 4 Notes of C. 285; The Priscilla, Lush. Adm. 1; The Betsy, 1 Dods. 289; The Duke of Bedford, 2 Hagg. Adm. 294; The Atlas, 2 Hagg. Adm. 49.

5 The Exeter, 1 C. Rob. 173; La Constancia, 4 Notes of C. 512.

6 The Rhadamanthe, 1 Dods. 201; The Sydney Cove, 2 Ibid. 1; The Eliza, 3 Hagg. Adm. 87; The Dunvegan Castle, Ibid. 331.

7 The Dunvegan Castle, 3 Hagg. Adm. 331; The Royal Arch, 1 Swabey, 269.

8 The Mary, 1 Paine, 671; Furniss v. The Magoun, Olcott, 66; Duke of Bedford, 2 Hagg. Adm. 294; Leland v. The Medora, 2 Wood. & M. 114; The Sydney Cove, 2 Dods. 11.

9 The Draco, 2 Sum. 157; Wilmer v. The Smilax, 2 Pet. Adm. 295; Herwig v. Oakley, Taney, 389; The Catherine, 1 Eng. L. & E. 679; Trantor v. Watson, 6 Mod. 13.

10 Oologardt v. The Anna, 9 Am. Law Reg. N. S. 475; S. C. 12 Int. Rev. Rec. 130.

11 Freight Money of The Anastasia, 1 Ben. 201; The Olivier, Lush. 492; The Karnak, 18 L. T. N. S. 661.

12 The Irma, 6 Ben. 1.

§ 112. Waiver of lien.—A bottomry bond is to be seasonably enforced.[1] If the lender delays the enforcement of the bond for an unreasonable time, and without a reasonable cause, the lien will be deemed waived as against a subsequent purchaser or attachment creditor without notice.[2] If the obligee permits the vessel to make several voyages without asserting his lien, it is lost, if executions are levied on her;[3] but if proceedings are taken within a reasonable time, the mere departure of the vessel from the return port does not affect the lien.[4]

1 The Boston, Blatchf. & H. 328; Blaine v. The Charles Carter, 4 Cranch, 328; Burke v. The M. P. Rich, 1 Cliff. 315; The Buckeye State, Newb. Adm. 114; The Mary, 1 Paine, 186; Griswold v. The Nevada, 2 Sawy. 146; The Favorite, 1 Biss. 528; Cole v. The Atlantic, Crabbe, 448.

2 Fontaine v. Beers, 19 Ala. 722; Blaine v. The Charles Carter, 4 Cranch, 328; Wilmer v. The Smilax, 2 Pet. Adm. 295; Leland v. The Medora, 2 Wood. & M. 92; The Draco, 2 Sum. 157; The Nestor, 1 Sum. 73; The Chusan, 2 Story, 455; The Sydney Cove, 2 Dods. 1; The Rebecca, 5 C. Rob. 102.

3 Blaine v. The Charles Carter, 4 Cranch, 328.

4 Burke v. The M. P. Rich, 1 Cliff. 308.

§ 113. Respondentia.—The word "respondentia" is properly applied to the loan of money upon merchandise laden on board of ship, the payment made to depend on the safe arrival of the vessel.[1] It is the same with respect to the goods as a bottomry is to the vessel.[2] The lender must run the marine risk to be entitled to the marine interest.[3] A part or the whole of the cargo may be hypothecated, according to the necessity of the case;[4] but it cannot be given to include cargo not actually on board.[5] A loan "upon the goods, to the amount of the loan, laden or to be laden, at any time during the voyage," gives a lien only on the homeward voyage.[6] The master, in case of necessity at a port of distress, may hypothecate the cargo.[7] If made by him, it can only be in a case in which

he would be authorized to hypothecate the ship and freightage.[8] Any general power on behalf of the owner to hypothecate the cargo should be limited to the interest in the freight.[9] A respondentia bond does not pass the right of property on the goods; it is a mere personal contract.[10] The lender is not presumed to lend upon the faith of any particular appropriation of the money; his security cannot be ended by a misappropriation of the fund.[11] The owner of the vessel is bound to pay to the owner of the cargo all which the latter is compelled to pay under the contract.[12] The bond is binding, though given for an old debt.[13]

1 Maitland *v.* The Atlantic, Newb. Adm. 514; S. C. 3 Am. Law Reg. 477.

2 The Gratitudine, 3 C. Rob. 240; The Osmanli, 3 Wm. Rob. 198; Nostra Senora del Carmine, 29 Eng. L. & E. 572; Conard *v.* Atlantic Ins. Co. 1 Pet. 386.

3 Thorndike *v.* Stone, 11 Pick. 187.

4 The Lord Cochrane, 1 Wm. Rob. 312; 2 Ibid. 320; The Osmanli, 3 Wm. Rob. 198; Justin *v.* Ballam, 1 Salk. 34.

5 The Edmond, Lush. 57.

6 Atlantic Ins. Co. *v.* Conard, 4 Wash. C. C. 662.

7 Naylor *v.* Baltzell, Taney, 55.

8 The Active, 2 Wash. C. C. 237; Pope *v.* Nickerson, 3 Story, 465; The Gratitudine, 3 C. Rob. 196, 263; The Lord Cochrane, 2 Wm. Rob. 312; The Prince Regent, Ibid. 83; The Osmanli, 3 Wm. Rob. 214; The Priscilla, 1 Lush. 1; La Constancia, 4 Notes of C. 235; The Packet, 3 Mason, 255; U. S. Ins. Co. *v.* Scott, 1 Johns. 106; Searle *v.* Scovell, 4 Johns. Ch. 222; Amer. Ins. Co. *v.* Coster, 3 Paige, 323.

9 Freight Money of the Anastasia, 1 Ben. 188.

10 U. S. *v.* Delaware Ins. Co., 4 Wash. C. C. 418.

11 Conard *v.* Atlantic Ins. Co. 1 Pet. 386.

12 Duncan *v.* Benson, 1 Ex. 537.

13 Greely *v.* Smith, 3 Wood. & M. 236; Hurry *v.* Hurry, 2 Wash. C. C. 145.

damages for his removal to the value of his "lay."[10] A mere conditional dismissal will not affect third parties.[11] The owners will be liable for stores furnished the vessel upon the order of the master who was subsequently displaced.[12] The mate in case of casualty may become temporary master, and third persons may rightfully treat with him as such.[13]

1 Ward v. Ruckman, 34 Barb. 419.

2 The Boston, Blatchf. & H. 309.

3 The Dubuque, 2 Abb. U. S. 20; L'Arina v. The Exchange, Bee, 197. See Rev. Stats. sec. 4612.

4 Fox v. Holt, 4 Ben. 278; The Tribune, 3 Sum. 144; The Swallow, Olcott, 334; Truesdale v. Young, Abb. Adm. 391; Thomas v. Osborn, 19 How. 45; L'Arina v. The Exchange, Bee, 198; L'Arina v. Manwaring, Bee, 199.

5 Citizenship, 10 Opin. Att. Gen. 382.

6 U. S. v. Gillies, Peters C. C. 159; S. C. 3 Wheel. C. C. 308.

7 The Jacmel Packet, 2 Ben. 107; The Boston, Blatchf. & H. 322; The Alexander, 1 Dods. 278.

8 Childs v. Gladding, 11 Am. Law Reg. 386. See Rev. Stats. sec. 4171.

9 Parsons v. Terry, 1 Low. 60; The Camilla, Swab. 312; Davis v. Maxfield, 10 Allen, 138.

10 Parsons v. Terry, 1 Low. 60.

11 Fox v. Holt, 36 Conn. 558.

12 Stringham v. Schloener, 4 Ben. 16.

13 The Amos C. Pratt, 1 Curt. 345; The Kinnersley Castle, 3 Hagg. Adm. 1; The Boston, Blatchf. & H. 322; The Favourite, 2 C. Rob. 232; The Alexander, 1 Dods. 278.

§ 115. Authority generally.—The master has complete authority in everything relating to the management and conduct of the vessel;[1] but it is limited to the purposes and objects of the voyage.[2] He may on general authority have an implied power to do what is fit and right to be done with ship or cargo in case of emergency.[3] It is limited by the express or implied authority derivable from the laws of the vessel's country, or the usages of trade; or the business of the ship, or the instructions of the owners.[4] He may regain possession of the vessel by ransom, or by purchase after capture and condemnation.[5] He has authority to use every necessary means to save his sunken vessel, and his contract to that end will bind the owners.[6] He has authority to borrow money, if necessary, to enable him to complete the voyage,[7] or to pay off officers and crew,[8] or to make up deficiency in custom-house charges;[9] but he cannot borrow money for work previously done.[10] As mortgagee the master has the right before seizure by the marshal to take possession of the property, but the claims of lien holders attach to it in his

hands as well as to the hull.[11] When part owner he is presumed to have general authority to bind the vessel; but he cannot subject the owners to expenses when forbidden to do so.[12] The power of masters of boats engaged in commerce on western inter-State navigable rivers is determined by maritime law.[13] The master, merely as such, cannot make insurance for owners.[14] But he may employ the vessel in a salvage service, and put at hazard the interest of her owner.[15] The underwriters, where there is no abandonment, have no authority to direct the master, or to contract for the vessel.[16]

1 The Henry, Blatchf. & H. 465; Stone v. Ketland, 1 Wash. C. C. 142.

2 Merwin v. Shaller, 12 Conn. 489.

3 The Ann D. Richardson, Abb. Adm. 503; Miston v. Lord, 1 Blatchf. 354.

4 The Woodland, 7 Ben. 118; The Pacific, Brown & L. 243.

5 Phillips v. McCall, 4 Wash. C. C. 141; The Gratitudine, 3 C. Rob. 268.

6 The H. D. Bacon, 1 Newb. Adm. 274.

7 The Fortitude, 3 Sum. 228; Weston v. Wright, 7 Mees. & W. 396; Arthur v. Barton, 6 Ibid. 138; Beldon v. Campbell, 6 Exch. 886.

8 Stearns v. Doe, 12 Gray, 482.

9 Descadillas v. Harris, 8 Greenl. 298.

10 Beldon v. Campbell, 6 Eng. L. & E. 473.

11 The George Prescott, 1 Ben. 1.

12 Revens v. Lewis, 2 Paine, 202.

13 Holcroft v. Halbert, 16 Ind. 256.

14 Holcroft v. Wilkes, 16 Ind. 373; Foster v. U. S. 11 Pick. 85; Patterson v. Chalmers, 7 B. Mon. 595.

15 Waterbury v. Myrick, Blatchf. & H. 34; The Centurion, 1 Ware, 477.

16 The Senator, 1 Brown Adm. 546; U. S. v. Scott, 1 Johns. 106.

§ 116. Authority as agent.—The master is the agent of the owners of the vessel[1] in all matters fully embraced in the scope of his appointment,[2] and for all purposes connected with the ordinary employment of the vessel;[3] the course of her usual employment being evidence to prove his authority.[4] The owners are bound by his contracts,[5] and are liable for his defaults, although the whole vessel is chartered, unless the charterer engages him and the seamen.[6] As agent he may receive freight, and pay it over to whom it belongs,[7] may settle claim for demurrage,[8] may hire seamen.[9] He becomes agent of the purchaser of goods sold at sea, if no agent presents himself to receive them.[10] The owners may constitute him general agent by parol, to exercise his best judgment in the disposal of the cargo, and the purchase of a return cargo.[11] The authority to purchase a cargo is not incident to the

office of the master,[13] and must be expressly given;[18] and if he transcends his authority, his acts are null.[14] If they permit him to purchase on their account, or have ratified his acts, they will be bound,[15] and his authority is not confined to the port where the vessel lies.[16] A ratification of the acts of a master beyond the scope of his authority may be inferred from a voluntary acceptance of the benefit derived, or from the fact that the owner had frequently employed the master to act for him in that way.[17] The master of a fishing vessel, also part owner, is agent for the owners where they do not interfere.[18] In case of necessity he is agent for all concerned, and his acts in good faith are binding.[19] In case of a constructive total loss the master is agent of the underwriters, and they are responsible for his acts.[20] The abandonment to underwriters will not operate as a ratification of his acts as agent,[21] nor does the mere presence of an agent of the owner have this effect.[22]

1 Ross v. The Active, 2 Wash. C. C. 226; Eads v. The H. D. Bacon, 1 Newb. Adm. 274; Stocker v. Corbett, 1 Const. Rep. 81; McDaniel v. Emanuel, 2 Rich. 455; Nelson v. Belmont, 21 N. Y. 36; 5 Duer, 310; Purvis v. Tunno, 1 Brev. 259; S. C. 2 Am. Dec. 664; The Eolian, 1 Biss. 322; Brown v. Lull, 2 Sum. 443; The Grand Turk, 1 Paine, 73; Poland v. The Spartan, 1 Ware, 134; Sheppard v. Taylor, 5 Peters, 675.

2 Pope v. Nickerson, 3 Story, 455; City Bank v. Nantucket S. Co. 2 Story, 16; The New World v. King, 16 How. 473.

3 Glading v. George, 3 Grant, 290; The Flash, Abb. Adm. 71; General Ins. Co. v. Ruggles, 12 Wheat. 400; Grant v. Norway, 10 Com. B. 665; The Freeman v. Buckingham, 18 How. 190; The Phebe, 1 Ware, 263.

4 The General Worth v. Hopkins, 30 Miss. 703.

5 Ward v. Green, 6 Cowen, 173; Oakland C. M. Co. v. Jennings, 46 Cal. 184; Edwin v. Naumkeag S. C. Co. 1 Cliff. 326; Poland v. The Spartan, 1 Ware, 134; Grant v. Norway, 10 Com. B. 665; Smith v. The Creole and Sampson, 2 Wall. Jr. 519. See CARRIER.

6 Purvis v. Tunno, 1 Brev. 259; S. C. 2 Amer. Dec. 664; Joy v. Allen, 2 Wood. & M. 317; Bray v. The Atalanta, Bee, 48; U. S. v. Hamilton, 1 Mason, 443; Mayo v. Harding, 6 Mass. 300; Murray v. Kellogg, 9 Johns. 227.

7 The Eolian, 1 Biss. 322; Brown v. Sull, 2 Sum. 443; The Grand Turk, 1 Paine, 73; Fisher v. Willing, 8 Serg. & R. 118; Poland v. The Spartan, 1 Ware, 134; Sheppard v. Taylor, 5 Peters, 675.

8 Alexander v. Dowie, 1 Hurl. & N. 152.

9 Sherwood v. Hall, 3 Sum. 127; Luscom v. Osgood, 1 Sprague, 82; Baker v. Corey, 19 Pick. 496.

10 Smith v. Davenport, 34 Me. 520.

11 Bidenlac v. Smith, 31 N. Y. 259.

12 Newhall v. Dunlap, 14 Me. 180; Hewett v. Buck, 17 Me. 147.

13 Lyman v. Redman, 23 Me. 289.

14 Naylor v. Baltzell, Taney, 55.

15 Hewett v. Buck, 17 Me. 147.

16 Zensel v. Kirk, 37 Barb. 113; S. C. 21 How. Pr. 184.

17 Newhall v. Dunlap, 14 Me. 180; Lyman v. Redman, 23 Me. 289; Peters v. Ballistier, 3 Pick. 495; Hathorn v. Curt, 8 Me. 356; Davis v. Marshall, 4 Harring. 64.

18 Baker v. Corey, 19 Pick. 496.

19 Copeland v. Security Ins. Co. Woolw. 283; New Eng. Ins. Co. v. The Sarah Ann, 13 Peters, 387; S. C. 2 Sum. 206.

20 Peirce v. Ocean Ins. Co. 18 Pick. 83; Gordon v. Mass. F. & M. Ins. Co. 2 Pick. 249.

21 Ward v. Peck, 18 How. 267.

22 The Henry, 2 Blatchf. & H. 465.

§ 117. Restriction on authority.—The master is not an ordinary, but a special agent;[1] he has no authority as agent, if any third person is clothed with a special ownership.[2] He is not the agent of the owners as to the settlement of prior claims,[3] nor can he bind the owners by the allowance of an invalid claim,[4] nor by a bill of exchange, without authority,[5] nor execute, nor indorse bills or notes binding on the owners,[6] nor give a bond to procure discharge from attachment;[7] he cannot vary or annul the owners' express agreement,[8] nor can he bind the owners beyond the value of the ship and her earnings.[9] The relation as agent terminates with his absolute discharge.[10] When he becomes warehouseman, he acts as consignee, and not as master.[11] When the master acts under instructions limiting his authority, and these instructions were known to the creditor, it will operate to prevent claimant claiming anything within the limit.[12]

1 The Irma, 6 Ben. 7; The Thetis, 22 Law Tl. Rep. 272; S. C. Sts. V. A. 363; Mitchelson v. Oliver, El. & B. 419.

2 Webb v. Peirce, 1 Curt. 106; Gracie v. Palmer, 8 Wheat. 605.

3 Kelley v. Merrill, 14 Me. 228.

4 Merritt v. Walsh, 32 N. Y. 685.

5 Wallace v. Agry, 4 Mason, 336; The Joseph Cunard, Olcott, 120; Douglass v. Moody, 9 Mass. 548; Bowen v. Goddard, 10 Met. 375; The Mary Kelley, 27 Ala. 497.

6 Holcroft v. Halbert, 16 Ind. 256; Holcroft v. Wilkes, 16 Ind. 273; Gregg v. Robbins, 28 Miss. 347.

7 Carr v. Burke, 22 Miss. 233.

8 Burgon v. Sharpe, 2 Camp. 529.

9 The Larch, 3 Ware, 31; The H. B. Foster, 3 Ware, 167; The Rebecca, 1 Ware, 188; Naylor v. Baltzell, Taney, 62; Cannan v. Meaburn, 1 Bing. 243, 465.

10 General Ins. Ins. Co. v. Ruggles, 12 Wheat. 408.

11 Wilcocks v. Phillips, 1 Wall. Jr. 47. And see Gove v. Moses, 1 Wash. Ter. 13.

12 The Woodland, 7 Ben. 119; Pope v. Nickerson, 3 Story, 465.

§ 118. Authority as to employment of vessel.—The right of the master to contract for the employment of the vessel, is derived from the maritime code.[1] He may bind owners by a contract of affreightment,[2] but he cannot bind the owners of the vessel or his co-owners for goods not actually laden,[3] though their liability will not be affected by the fact that no bill of lading was signed;[4] and if in a bill of lading he inserts a price by mistake, the owners will not be bound thereby.[5] He may in a foreign port, but not at the home port, enter into a charter party.[6] The extent of his authority is limited to the express or implied instructions of the owners, or to the law of the country to which the ship belongs.[7] He cannot by mere virtue of his office bind the owners by a charter party under seal.[8] The master may hire seamen,[9] or engage them on a whaling voyage on shares,[10] but he cannot bind the owners for the payment of wages for three months after services cease.[11] He cannot after hiring the crew bind the owner to the payment of increased wages, without consideration, or the exercise of a reasonable discretion.[12]

1 The Hardy, 1 Dill. 400; Naylor v. Baltzell, Taney, 55.

2 Freeman v. Buckingham, 18 How. 182; Jackson v. The Julia Smith, 6 McLean, 484; S. C. 1 Newb. Adm. 61; The Hendrik Hudson, 7 Law Rep. N. S. 93; Murfree v. Redding, 1 Hayw. 276; Ward v. Green, 6 Cow. 173.

3 The Freeman v. Buckingham, 18 How. 182; Vandewater v. Mills, 19 How. 82; The Leon, 7 Blatchf. 244; Montell v. The H. H. Rutan, 1 Int. Rev. Rec. 125; Grant v. Norway, 2 Eng. L. & E. 337; Hubbersty v. Ward, 18 Eng. L. & E. 551; Coleman v. Riches, 29 Eng. L. & E. 323.

4 Fox v. Holt, 36 Conn. 558.

5 Barnard v. Wheeler, 24 Me. 412.

6 Hurry v. Hurry, 2 Wash. C. C. 145; The Flash, Abb. Adm. 71; The Tribune, 3 Sum. 144.

7 Pope v. Nickerson, 3 Story, 465; S. C. 7 Law Rep. 471; The Packet, 3 Mason, 255; The Nelson, 1 Hagg. Adm. 169; The Bahia, Brown. & L. 292; Penn. St. Nav. Co. v. Stand, 3 Moore P. C. C. N. S. 272. But see Arayo v. Currel, 1 La. 528; Malpica v. McKown, 1 La. 248.

8 Pickering v. Holt, 6 Me. 160.

9 Luscom v. Osgood, 1 Sprague, 82; S. C. 7 Law Rep. 122.

10 Whalen v. The Silver Spring, 32 Hunt's Mer. Mag. 711.

11 Canizares v. The Santissima Trinidad, Bee, 353.

12 Neilson v. The Laura, 2 Sawy. 242.

§ 119. Authority as to repairs and supplies.—The master of a vessel may procure all its necessary repairs and supplies,[1] and may bind owners by contract for the same,[2] in a foreign port,[3] in the port of a State to which she does not belong.[4] He may bind the vessel in a foreign port, although a note or other obligation is given for

the demand,[5] he may bind the owners to the value of the ship and freight.[6] A master having possession and command under a "lay" contract may, in cases of necessity, create a lien for repairs and supplies in a foreign port.[7] The master may bind owners, by a bill of exchange drawn for necessaries,[8] or by borrowing money in case of necessity,[9] though the necessity arose from his own misconduct.[10] They are necessaries, when they are fit and proper for the service in which the vessel is engaged, and such as a prudent owner would order.[11] To invest him with extraordinary powers, exigencies must arise calling for their exercise,[12] but if he acts in good faith his order for repairs and supplies is sufficient proof of their necessity.[13] The master cannot bind the owners when some other person is authorized to manage the business of the vessel, and the fact was known to the creditor,[14] as in the case of a chartered vessel,[15] for money advanced for repairs.[16] He cannot bind owners to pay for repairs done at the home port without special authority,[17] nor can he bind owners, when they or their agents were so near that communication could have been had with them without delay.[18]

1 Philips *v.* Ledley, 1 Wash. C. C. 226; Merwin *v.* Shaller, 12 Conn. 489; Provost *v.* Patchin, 9 N. Y. 235; Snyder *v.* Hurd, 8 Tex. 96.

2 Thomas *v.* Osborn, 19 How. 22; Philips *v.* Ledley, 1 Wash. C. C. 226; Patterson *v.* Chalmers, 7 B. Mon. 595; Wainwright *v.* Crawford, 4 Dall. 226; Palmer *v.* Gooch, 2 Stark. 423; The George, 1 Sum. 151; Hussey *v.* Allen, 6 Mass. 163; Joy *v.* Allen, 2 Wood. & M. 328; Rocher *v.* Busher, 1 Stark. 27; Webster *v.* Seekamp, 4 Barn. & Ald. 352. And see LIEN, § 77.

3 The Fortitude, 3 Sum. 228; Wainwright *v.* Crawford, 3 Yeates, 131.

4 Webb *v.* Peirce, 1 Sprague, 192.

5 The Hilarity, Blatchf. & H. 90; The Panama, Olcott, 343.

6 Naylor *v.* Baltzell, Taney, 55.

7 Thomas *v.* Osborn, 19 How. 22.

8 Millward *v.* Hallett, 2 Caines, 77; The Hilarity, Blatchf. & H. 92.

9 Wainwright *v.* Crawford, 4 Dall. 225; Ross *v.* The Active, 2 Wash. C. C. 226.

10 Descadillas *v.* Harris, 8 Mo. 298.

11 The Medora, 1 Sprague, 138. And see Fox *v.* Holt, 4 Ben. 278.

12 Merritt *v.* Walsh, 32 N. Y. 685.

13 The Grapeshot, 9 Wall. 129; The Fortitude, 3 Sum. 257; La Ysabel, 1 Dods. 273; The Lulu, 10 Wall. 202; The Nestor, 1 Sum. 73.

14 The Joseph Cunard, Olcott, 125; Philips *v.* Ledley, 1 Wash. C. C. 226.

15 The City of New York, 3 Blatchf. 187; S. C. 12 N. Y. Leg. Obs. 309.

16 The William and Emmeline, Blatchf. & H. 66.

17 Dyer *v.* Snow, 47 Me. 254. And see Holcroft *v.* Halbert, 16 Ind. 256; Jordon *v.* Young, 37 Me. 276.

18 Woodruff &c. Iron Works *v.* Stetson, 31 Conn. 51.

§ 120. Authority as supercargo.—The master, in case of necessity, is clothed with the authority of supercargo, when he is bound to act to the best interests of the merchant,[1] he acts in relation to the selling of the goods as the agent of the consignor.[2] The master, also consignee, has authority of supercargo.[3] Where he acts also in the capacity of supercargo, his duties, under the two characters, are distinct and independent.[4] The master, as supercargo, not being able to effect a sale of the cargo, may leave it at its port of destination with a responsible party for sale.[5]

1 The Velona, 3 Ware, 140; The Gratitudine, 3 C. Rob. 240.

2 The Waldo, 2 Ware (Dav.) 161; S. C. 4 Law Rep. 382; Stone v. Waitt, 31 Me. 409; Williams v. Nichols, 13 Wend. 58.

3 Smedley v. Yeaton, 3 Cranch C. C. 181; Biggs v. Lawrence, 3 Term Rep. 454.

4 Courcier v. Ritter, 4 Wash. C. C. 552; Dusar v. Perit, 4 Bing. 361; The Waldo, 2 Ware (Dav.) 161; S. C. 4 Law Rep. 382.

5 Stone v. Waitt, 31 Me. 409.

§ 121. Authority to sell vessel.—The general authority of a master to sell the vessel is not implied.[1] Although formerly denied, it is now held that the master has authority to sell the vessel in case of actual necessity in a foreign port,[2] a strong necessity,[3] an urgent necessity,[4] an extreme necessity,[5] an overwhelming necessity;[6] when a considerate owner would have done so under like circumstances,[7] although subsequent events might show that a different course would have been attended with success,[8] a moral necessity, amounting to a strong and vehement exigency;[9] an imperious and incontrollable necessity, operating as an urgent duty;[10] as in case of famine,[11] or shipwreck;[12] in case of wreck or inevitable disaster,[13] unless by the earliest use of ordinary means of communication he can inform the owners and await their instructions.[14] He has authority to sell the wrecked vessel, when, proceeding in good faith, exercising his best discretion, for the benefit of all concerned, whether in view of perils involving loss, or one likely to arise, from which, in the opinion of competent persons, the vessel cannot be rescued.[15] Necessity and good faith must concur.[16] He may sell on a home shore as well as on a foreign shore,[17] but he cannot sell at the home port of the vessel,[18] the criterion of his authority being the distance of the owners or insurer from the place of disaster.[19] He may sell in good faith the rigging and sails, as well as the vessel.[20] Whether a necessity actually exists or not depends on the circumstances.[21] It is held to exist where the vessel is disabled, stranded, or sunk, if it appears the master

had no means, and could raise no funds to repair, and prosecute the voyage.[22] The expense of necessary repairs must be in such preponderance over the value of the vessel as to leave no doubt in the mind of a reasonable man.[23] A precedent examination of the vessel by competent surveyors, and their report, stating her condition, and advising a sale, is essential,[24] though the report is not of itself conclusive.[25]

1 The Henry, Blatchf. & H. 468; relaxing the rule in Tremenhere v. Tresillian, 1 Sid. 452; Johnson v. Shippen, 1 Salk. 35; Reid v. Darby, 10 East, 143; Hunter v. Prinsep, 10 East, 378; Ekins v. The East India Co. 1 P. Wms. 395.

2 The Amelie, 6 Wall. 26; New Eng. Ins. Co. v. The Sarah Ann, 2 Sum. 213; S. C. 13 Pet. 387; Post v. Jones, 19 How. 150; Fitz v. The Amelie, 2 Cliff. 443; The Brutus, 2 Gall. 548; The Henry, Blatchf. & H. 465; Tome v. Dubois, 6 Wall. 554; The Fanny & Elmira, Edw. Adm. 117; The Gratitudine, 3 C. Rob. 240, and see The Virgin, The Robert L. Lane, 1 Low. 391; The Patapsco Ins. Co. v. Southgate, 5 Pet. 604; Pope v. Nickerson, 3 Story, 465; Robinson v. Com. Ins. Co. 3 Sum. 220; The J. F. Spencer, 3 Ben. 339; Badlam v. Tucker, 1 Pick. 389; Cannan v. Meaburn, 1 Bing. 243; Robertson v. Clarke, Id. 445; Somes v. Sugrue, 4 Car. & P. 276; Meaburn v. Leckie, 4 Dow. & R. 207; Hayman v. Molton, 5 Esp. 65; Hunter v. Parker, 7 Mees. &. W. 322; Tanner v. Bennett, Ryan & M. 182; Idle v. Royal Exch. Assu. Co., 8 Taunt. 755; Stephenson v. Piscataqua &c. Ins. Co., 54 Me. 55; Butler v. Murray, 30 N. Y. 88; Chambers v. Grantzon, 7 Bos. 414; Pierce v. Ocean Ins. Co., 18 Pick. 83; Miston v. Lord, 1 Blatchf. 354; The William Carey, 3 Ware, 313.

3 Joy v. Allen, 2 Wood. & M. 328; Tunno v. The Mary, Bee, 120; The Tilton, 5 Mason, 476; Gordon v. The Mass. F. & M. Ins. Co. 2 Pick. 249; Fontaine v. Phœnix Ins. Co. 11 Johns. 293; Scull v. Briddle, 2 Wash. C. C. 150; Read v. Bonham, 3 Brod. & B. 147.

4. The Tilton, 5 Mason, 476; The Henry, Blatchf. & H. 470; limiting Center v. Amer. Ins. Co. 7 Cow. 564; Church v. Mar. Ins. Co. 1 Mason, 344; Storer v. Gray, 2 Mass. 555; Story v. Strettell, 1 Dall. 10; Regina v. Union Ins. Co., Marsh. on Ins. 582; McMasters v. Schoolbred, 1 Esp. 237; Havelock v. Rockwood, 8 Term Rep. 268; Green v. Royal Exchange Assu. Co. 6 Taunt. 68; The Nathaniel Hooper, 3 Sum. 350, questioning The Two Friends, Abb. Adm. 246.

5 The Henry, Blatchf. & H. 469; The Tilton, 5 Mason 475; Patapsco Ins. Co. v. Southgate, 5 Pet. 604; The Sarah Ann, 13 Pet. 387; S. C. 2 Sum. 206; Scull v. Briddle, 2 Wash. C. C. 150; Fitz v. The Amelie, 2 Cliff. 442; Mills v. Fletcher, 1 Doug. 231; Hunter v. Parker, 7 Mees. & W. 342; The Fanny & Elmira, Edwd. Adm. 117; Cannan v. Meaburn, 1 Bing. 243; Read v. Bonham, 3 Brod. & B. 147; Freeman v. East Ind. Co. 5 Barn. & Ald. 617; Underwood v. Robertson, 4 Camp. 138.

6 The Fortitude, 3 Sum. 249; The Sarah Ann, 2 Sum. 206; Patapsco Ins. Co. v. Southgate, 5 Pet. 604; Winn v. Columbian Ins. Co. 12 Pick. 279.

7 Robinson v. Com. Ins. Co., 3 Sum. 227; Winn v. Columbian Ins. Co. 12 Pick. 279; Hall v. Franklin Ins. Co., 9 Pick. 466.

8 The Fortitude, 3 Sum. 249; The Sarah Ann, 2 Sum. 206; Idle v. Royal Exch. Assu. Co. 8 Taunt. 755; The Warrior, 2 Dods. 288; The Packet, 3 Mason, 255; Winn v. Columbian Ins. Co. 12 Pick. 279.

9 Fitz v. The Amelie, 2 Cliff. 444; Robinson v. Commonwealth Ins. Co., 3 Sum. 220; Hall v. Franklin Ins. Co. 9 Pick. 466; The Amelie, 6 Wall. 18; The Lucinda Snow, Abb. Adm. 305; Pope v. Nickerson, 3

5 Bryant *v.* Comm. Ins. Co. 6 Pick. 131; Douglass *v.* Moody, 9 Mass. 548; Jordan *v.* Warren Ins. Co. 1 Story, 342.

6 The Velona, 3 Ware, 139; Watt *v.* Porter, 2 Mason, 77.

7 Van Syckle *v.* The Thomas Ewing, 3 Pa. L. J. 301.

8 Myers *v.* Baymore, 10 Pa. St. 114; The Ann D. Richardson, 1 Blatchf. 358.

9 Jordan *v.* Warren Ins. Co. 1 Story, 342; Smith *v.* Martin, 6 Binn. 262.

10 Naylor *v.* Baltzell, Taney, 55.

11 Pike *v.* Balch, 30 Me. 302.

12 Bryant *v.* Com. Ins. Co. 6 Pick. 131; 13 Id. 544; The Joshua Barker, Abb. Adm. 219; Amory *v.* McGregor, 15 Johns. 24; Bracket *v.* McNair, 14 Johns. 170.

13 The Joshua Barker, Abb. Adm. 215.

14 Goodwin *v.* United States, 6 Ct. of Cl. 146.

15 Peters *v.* Ballistier, 3 Pick. 495; The Joshua Barker, Abb. Adm. 219; Arnold *v.* Halenbake, 5 Wend. 23.

16 Henshaw *v.* Clark, 2 Root, 103.

17 Winn *v.* Columbian Ins. Co. 12 Pick. 279.

§ 123. Validity of sale by master.—When a contingency occurs authorizing the master to sell, his acts are binding on the owners,[1] the sale will be deemed valid if the circumstances attending it were such that a prudent owner would have done the same under the circumstances.[2] The burden of proving necessity is on the person claiming title under the sale,[3] apparent necessity exists when the vessel is not at her home port, but this may be repelled by proof to the contrary,[4] as when the proposed purchaser had it in his power to save her,[5] so, of a vessel sold at the port of destination for want of funds,[6] that the master was furnished with means.[7] Where the master finds that the disaster will be most alleviated, and the interest of all parties be best subserved, it is his duty to act, and if he makes the sale *bona fide* for the benefit of all concerned it is valid, and all are bound by his acts,[8] and none the less because the owners were present on the spot.[9] The question of necessity and good faith is a question of fact.[10] If the master sells without good faith or a sound discretion, the owners may as against the purchaser assert their right of property.[11] Where the master is part owner and not authorized to sell, as master, his interest only passes to the vendee,[12] and where the vendee knows that the master is specially bound under an authorization to sell, the owner is not bound if he departs from his authority.[13] One who accepts title under a master's sale must see that his title is without taint or just cause of suspicion,[14] as a party purchasing from a trustee is in no better situation than the seller.[15] The master cannot depute his authority,[16] nor can he purchase at his own

sale,[17] and if he does, it will be considered for the benefit of the owners if they elect so to regard it.[18] A valid sale cuts off all prior liens,[19] and title passes without a bill of sale, but an unauthorized sale vests no title,[20] a sale followed by possession is sufficient.[21] In case of an unauthorized sale, the purchaser may make restitution and be allowed his purchase-money and subsequent repairs and expenses.[22] The master of a canal boat is not so invested with the *indicia* of ownership that a *bona fide* purchaser from him can hold the boat as against the real owners;[23] so, the master has no power to sell part of a vessel for the purpose of keeping a bar.[24]

1 Woods *v.* Clark, 24 Pick. 35.

2 Hayman *v.* Molton, 5 Esp. 65.

3 Joy *v.* Allen, 2 Wood. & M. 303; The Fortitude, 3 Sum. 236; Greely *v.* Smith, 3 Wood. & M. 236; The Alexander, 1 Dods. 278; Idle *v.* The Royal Ex. Assu. Co. 8 Taunt. 755.

4 The Washington Irving, 7 Int. Rev. Rec. 109; Smith *v.* The Eastern Railroad, 1 Curt. 259; The Jerusalem, 2 Gall. 349; Peirce *v.* Ocean Ins. Co. 18 Pick. 83.

5 Post *v.* Jones, 19 How. 150.

6 Williams *v.* Smith, 2 Caines, 13; Ruckman *v.* Merch. Ins. Co. 5 Duer, 342; Allen *v.* Com. Ins. Co. 1 Gray, 158. But see Amer. Ins. Co. *v.* Ogden, 15 Wend. 532; S. C. 20 Wend. 287.

7 Joy *v.* Allen, 2 Wood. & M. 328; Union Ins. Co. *v.* Scott, 1 Johns. 106.

8 Fitz *v.* The Amelie, 2 Cliff. 446; The Eliza Cornish, Spinks Ec. & Ad. 36; The Glasgow, Swabey, 145; The Margaret Mitchell, Swabey, 286; The Bonita and Charlotte, Lush. 259; The Australia, Swabey, 484; The Catherine, 1 Eng. L. & E. 679; S. C. 15 Jur. 231; Idle *v.* Royal Ex. Assu. Co. 8 Taunt. 755; The Henry, Blatchf. & H. 469.

9 The Henry, Blatchf. & H. 477; Idle *v.* Royal Ex. Assu. Co. 8 Taunt. 755.

10 Stearns *v.* Doe, 12 Gray, 482.

11 New England Ins. Co. *v.* The Sarah Ann, 13 Peters, 402, disapproving Scull *v.* Briddle, 2 Wash. C. C. 150.

12 Peirce *v.* Ocean Ins. Co. 18 Pick. 83.

13 Johnson *v.* Margate, 20 Me. 404.

14 Hartman *v.* The William, 4 Pa. L. J. 350.

15 Scudder *v.* Calais &c. Co. 1 Cliff. 370.

16 The Tilton, 5 Mason, 431; distinguishing Reid *v.* Darby, 10 East, 143.

17 Barker *v.* Mar. Ins. Co. 2 Mason, 369; Church *v.* Mar. Ins. Co. 1 Mason, 344; Sawyer *v.* Mar. F. & M. Ins. Co. 12 Mass. 291; McMasters *v.* Schoolbred, 1 Esp. 237; Story *v.* Strettell, 1 Dall. 10; Storer *v.* Gray, 2 Mass. 565; Oliver *v.* Newburyport Ins. Co. 3 Mass. 37; Abbott *v.* Broome, 1 Caines, 292; United Ins. Co. *v.* Robinson, 2 Caines, 280; Abbott *v.* Sebor, 3 Johns. Cas. 39; Walden *v.* Phœnix Ins. Co. 5 Johns. 310; Havelock *v.* Rockwood, 8 Term Rep. 268.

18 Chamberlain *v.* Harrod, 5 Me. 420.

19 The Amelie, 8 Wall. 18.

20 The Amelie, 8 Wall. 18; The Sarah Ann, 2 Sum. 206; affirmed, 13 Pet. 387; Scull *v.* Briddle, 2 Wash. C. C. 150.

21 The Amelie, 8 Wall. 18.

22 The Henry, Blatchf. & H. 465.
23 Ingersoll v. Emmerson, 1 Cart. (Ind.) 76.
24 Kelly v. Dickinson, 15 Mo. 153.

§ 124. Duties of master.—The Act of Congress requiring the master to deposit ship's papers on arrival at a foreign port, does not apply to vessels merely touching for advices.[1] The master is bound to the owners for skill and care in the management of the vessel,[2] and to a careful supervision over fires and lights.[3] He must not abandon his vessel and cargo in time of danger so long as it is practicable for human exertion, skill, and prudence to save them from impending peril.[4] His duty is not discharged until the ship is in a place of safety, or, in case of loss, until the proceeds saved are placed at the disposal of the owners.[5] In case of capture, he is bound to remain with the vessel until condemnation, or till a recovery is hopeless;[6] but he is not obliged to violate the good faith even of an enemy to preserve his ship, nor to employ fraud to effect that object.[7] It is proper but not indispensable, in case of an accident, to note a protest thereof at the first port afterwards reached,[8] and to give information to the owner of the loss of the vessel as soon as he reasonably can.[9] It is his duty to interpose a claim to property in his charge against which proceedings are instituted.[10] Where a person falls overboard the master is bound, both by the law and by contract, to do everything consistent with the safety of the ship, crew, and passengers to effect his rescue, no matter what delay or expense is occasioned.[11] The master is bound to fulfill his whole duties, and his responsibilities should not be changed or lightly regarded.[12]

1 Harrison v. Vose, 9 How. 372; The Elizabeth, 1 Paine, 10; The Enterprise, 1 Paine, 32; U. S. v. Hatch, 1 Paine, 336. And see Rev. Stats. secs. 4575, 4576. As to list of crew to be delivered to Collector before clearance, see Taber v. U. S. 1 Story, 1; Rev. Stats. sec. 4573.

2 The Niagara v. Cordes, 21 How. 7; Stone v. Ketland, 1 Wash. C. C. 142.

3 New Jersey S. N. Co. v. Merchants' Bank, 6 How. 426; Patapsco Ins. Co. v. Coulter, 3 Pet. 222.

4 The Niagara v. Cordes, 21 How. 7.

5 Duncan v. Reed, 39 Me. 415.

6 Willard v. Dorr, 3 Mason, 161.

7 Hannay v. Eve, 3 Cranch, 242.

8 Hunt v. The Cleveland, 6 McLean, 76; S. C. Newb. Adm. 221.

9 Ruggles v. The General Ins. Co. 4 Mason, 74.

10 Marshall v. Union Ins. Co. 2 Wash. C. C. 462.

11 U. S. v. Knowles, 4 Sawy. 517.

12 The Rollan, 1 Biss. 322; Brown v. Lull, 2 Sum. 443; The Grand Turk, 1 Paine, 73; Fisher v. Willing, 8 Serg. & R. 118; Poland v. The Spartan, 1 Ware, 134; Sheppard v. Taylor, 5 Pet. 675.

§ 125. Bond for safe return of seamen.—The conditions of the bond provided by Act of Congress requiring the master sailing to a foreign port to give security for the return of the ship's company to the United States does not extend to requiring a return where the vessel is sold in a foreign port.[1] In cases contemplated by the act he is bound to pay into the hands of the resident consul three months' extra wages of the seamen;[2] but the master is under no obligation to pay the same to the seamen.[3] The bond was held valid, although it did not refer to the statute, and although it was not stated which of the obligors was principal and which surety.[4] It applies to those cases only where the vessel returns to the United States, and where the seamen remain subject to the lawful authority of the master, and it was in his power to bring them home,[5] and not to cases where the seamen were lawfully separated from the vessel;[6] nor is the master required to return to the United States seamen shipped abroad and discharged at their own home even without the intervention of the consul.[7] That the terminus of the voyage is not specified, will not justify a discharge of seamen abroad, the presumption being that a return to the United States was intended.[8]

See SEAMAN, § 166.

1 Montell *v.* U. S., Taney, 24; U. S. *v.* Hatch, 1 Paine, 336; Tingle *v.* Tucker, Abb. Adm. 519. And see Rev. Stats. sec. 4576.

2 Montell *v.* U. S., Taney, 24; Dustin *v.* Murray, 5 Ben. 13; The Dawn, 2 Ware, 121. See Rev. Stats. sec. 4581.

3 Pool *v.* Welsh, Gilp. 201; Ogden *v.* Orr, 12 Johns. 143.

4 U. S. *v.* Hatch, 1 Paine, 336.

5 Montell *v.* U. S., Taney, 24.

6 Montell *v.* U. S., Taney, 24.

7 U. S. *v.* Parsons, 1 Low. 107; Matthews *v.* Offley, 3 Sum. 115.

8 Burke *v.* Buttman, 1 Low. 191.

§ 126. Return of destitute seamen.—The provisions in the Revised Statutes requiring masters, at the request of the consul in a foreign port, to transport destitute seamen to the United States, is limited to such vessels as are bound direct from such port to some port in the United States.[1] They are not compelled to carry seamen or other persons accused of crime, and intended to be transported to the United States for prosecution;[2] but the fact of their desertion does not supersede the authority of the consul to require the transportation of a destitute seaman.[3] The consul is the proper judge as to the vessel in which he should be placed.[4] Such seamen are bound by the same regulations as articled seamen,[5] and are bound to render

what assistance they can; and this, though their passage be paid by the United States.[6] Where a minor, a stowaway, was left at a foreign port, it is the duty of the consul to provide for him and return him to the United States.[7] The certificate of the consul is *prima facie* evidence of the refusal of the master to take a seaman on board, and of all facts stated in the enacting clause of the statute necessary to bring the case within the penalty.[8]

1 Obligations of Shipmasters, 4 Opin. Att. Gen. 185. And see Rev. Stats. sec. 4577.

2 Duty of Shipmasters, 7 Opin. Att. Gen. 722.

3 Matthews *v.* Offley, 3 Sum. 115.

4 Matthews *v.* Offley, 3 Sum. 115; Allowance for transportation home, see Rev. Stats. sec. 4579.

5 U. S. *v.* Sharp, Peters C. C. 118.

6 U. S. *v.* Salisbury, 2 N. Y. Leg. Obs. 53.

7 Luscom *v.* Osgood, 1 Sprague, 82; S. C. 7 Law Rep. 132.

8 Matthews *v.* Offley, 3 Sum. 115. As to penalty for refusal to receive, see Rev. Stats. sec. 4578.

§ 127. Duty as to crew.—It is the duty of the master to see personally that his crew are provided with a sufficient quantity of provisions,[1] and to protect the crew from illegal violence;[2] to restrain the violence of the officers,[3] and to set an example of discretion and temper.[4] It is his duty to quell an affray between the mate and crew, and to use such means and force as might fairly be deemed necessary;[5] if he is present and consents to an assault on a seaman, he will be jointly liable.[6]

1 The Elizabeth Frith, Blatchf. & H. 195.

2 Shorey *v.* Rennell, 1 Sprague, 407.

3 Anderson *v.* Ross, 2 Sawy. 91.

4 Thorne *v.* White, 1 Pet. Adm. 174.

5 Jordan *v.* Williams, 1 Curt. 69; S. C. 4 Law Rep. N. S. 421.

6 Hamon *v.* Fowler, 1 Sawy. 539; Thomas *v.* Lane, 2 Sum. 1.

§ 128. Authority to enforce discipline.—The master has the sole and exclusive command, in the navigation and management of the vessel, which inferior officers and seamen are bound to obey.[1] He has the right to enforce discipline,[2] and is justified in the use of any means to this end.[3] The law demands a strict adherence to duty from both master and crew, and the use of proper language no less than proper acts,[4] and gives the master the right of respectful demeanor as well as obedience, on the part of the crew.[5] The government and discipline being largely in the discretion of the master, courts can only see that they are administered temperately, and with reasonable regard to the capacity, constitution and feelings of the

crew.[6] The law gives the master authority to use coercive measures to compel obedience to his lawful orders,[7] or to suppress resistance or mutinous conduct.[8] Any officer may use force to coerce the performance of duty when necessity requires.[9] The master may resort to weapons, but they must be proper weapons.[10] He may use a deadly weapon when necessary to suppress a mutiny,[11] but only when mutiny exists, or is threatened.[12] In all cases, before resorting to their use, he should consult others, but in some cases it is not safe.[13] If he should stop to consult, or argue long with the offender, and not use deadly weapons when other means failed, the vessel might be lost.[14] If circumstances warrant, he is justified in their use, although subsequent events show that less severe measures would have answered.[15] The master may also restrain, or even confine, a passenger who refuses to submit to the necessary discipline of the ship,[16] but without conferring with the officers and an entry of the facts in the log-book, he can inflict no higher punishment upon a passenger than a reprimand.[17]

1 Butler *v.* McLellan, 1 Ware, 219; Jay *v.* Almy, 1 Wood. & M. 268; Allen *v.* Hallet, Abb. Adm. 576; The Elizabeth Frith, Blatchf. & H. 195; Grant *v.* Bailey, 12 Mod. 440.

2 The Maria, 1 Pet. Adm. 180; The Nimrod, 1 Ware, 18.

3 Wilkes *v.* Dinsman, 7 How. 128.

4 Fuller *v.* Colby, 3 Wood. & M. 6; U. S. *v.* Peterson, 1 Wood. & M. 305.

5 Fuller *v.* Colby, 3 Wood. & M. 6; U. S. *v.* Smith, 3 Wash. C. C. 78, 526; Butler *v.* McLellan, 1 Ware, 219; Thompson *v.* Brusch, 4 Wash. C. C. 338.

6 Gould *v.* Christianson, Blatchf. & H. 521; Rice *v.* The Polly and Kitty, 2 Pet. Adm. 420.

7 The Palledo, 3 Ware, 321; Roberts *v.* Eldredge, 1 Sprague, 54; U. S. *v.* Alden, 1 Sprague, 95; U. S. *v.* Colby, Id. 119; U. S. *v.* Lunt, Id. 311; Shorey *v.* Rennell, Id. 407; Dinsman *v.* Wilkes, 12 How. 390.

8 Gardner *v.* Bibbins, Blatchf. & H. 356; Sheridan *v.* Furbur, Id. 423; U. S. *v.* Alden, 1 Sprague, 95; S. C. 7 Law Rep. 469; U. S. *v.* Wickham, 1 Wash. C. C. 316; U. S. *v.* Wiltberger, 3 Id. 515; Fuller *v.* Colby, 3 Wood. & M. 1; S. C. 9 Law Rep. 397.

9 Sheridan *v.* Furbur, Blatchf. & H. 423; Pendergast *v.* Lampman, Deady, 54; Morris *v.* Cornell, 1 Sprague, 62; Payne *v.* Allen, Id. 394; Shorey *v.* Rennell, Id. 407; U. S. *v.* Hunt, 2 Story, 120; S. C. 4 Law Rep. 371; U. S. *v.* Taylor, 2 Sum. 584.

10 Fuller *v.* Colby, 3 Wood. & M. 14; Thorne *v.* White, 1 Pet. Adm. 174; U. S. *v.* Smith, 3 Wash. C. C. 526; Hart *v.* The Littlejohn, 1 Pet. Adm. 118.

11 Roberts *v.* Eldredge, 1 Sprague, 54; Fuller *v.* Colby, 3 Wood. & M. 153; U. S. *v.* Peterson, 1 Wood. & M. 305; Brown *v.* Howard, 14 Johns. 122; U. S. *v.* Colby, 8 Law Rep. 496; Jarvis *v.* Claiborne, Bee, 248.

12 Jarvis *v.* Sherwood, Bee, 248; Fuller *v.* Colby, 3 Wood. & M. 14; U. S. *v.* Smith, 3 Wash. C. C. 78, 525.

13 Fuller *v.* Colby, 3 Wood. & M. 15; Relf *v.* The Maria, 1 Pet. Adm. 184; Sampson *v.* Smith, 15 Mass. 365; Jarvis *v.* Claiborne, Bee, 248.

14 Fuller v. Colby, 3 Ware, 14; Butler v. McLellan, 1 Ware, 219.

15 Roberts v. Eldredge, 1 Sprague, 54; U. S. v. Colby, Id. 119; U. S. v. Lunt, Id. 311.

16 Chamberlain v. Chandler, 3 Mason, 242; Boyce v. Bayliffe, 1 Camp. 58; Prendergast v. Campton, 8 Car. & P. 454.

17 Krauskopp v. Ames, 7 Pa. Law Jr. 77; 4 Id. 100; 6 Car. & P. 472.

§ 129. Authority to punish.—The authority to punish, on board of a merchant ship, is vested primarily in the master,[1] and is summary in its character.[2] The power is to be exercised with extreme forbearance and moderation.[3] He may inflict moderate chastisement for disobedience, intemperance, or insubordination,[4] for disrespectful, disobedient, or disorderly conduct, as a schoolmaster a pupil,[5] or a parent a child.[6] The master may correct a negligent, disobedient, or mutinous seaman by corporal punishment, but it must be reasonable,[7] to a reasonable extent, and in a decent manner,[8] and not disproportionate to the offense.[9] The provision in the Act of Congress abolishing flogging, abolishes only corporal punishment inflicted by stripes;[10] the punishment must not be inflicted with an unlawful instrument;[11] no facts can justify punishment by flogging.[12] In determining whether the chastisement was justified, the weapon used is an important consideration.[13] Knocking a seaman down with a belaying-pin is an illegal mode of punishment,[14] so the use of a handspike or a slung-shot is illegal.[15] Only the highest officer can inflict punishment for a past offense,[16] a temporary master has no such authority.[17] A second mate rightfully displaced, is liable to punishment for refusal to perform other duty.[18] The master is the judge of whether a seaman is entitled to his discharge at a foreign port, and if he refuses to do his duty, he is liable to punishment.[19] Where the seaman is incorrigible, the master may discharge him, or correct or confine him, or dock him of his privileges,[20] but he cannot superadd a forfeiture of wages after inflicting corporal punishment.[21]

1 Gardner v. Bibbins, Blatchf. & H. 360; Fuller v. Colby, 3 Wood. & M. 13; U. S. v. Harriman, 1 Hughes, 526; The Agincourt, 1 Hagg. Adm. 271; Thorne v. White, 1 Pet. Adm. 172.

2 U. S. Harriman, 1 Hughes, 526.

3 Sheridan v. Furbur, Blatchf. & H. 423; Butler v. McLellan, 1 Ware, 219; Thorne v. White, 1 Pet. Adm. 172.

4 U. S. v. Wickham, 1 Wash. C. C. 316; Jarvis v. Sherwood, Bee, 248; U. S. v. Smith, 3 Wash. C. C. 525; Thomas v. Gray, Blatchf. & H. 505. The Mentor, 4 Mason, 84; Butler v. McLellan, 1 Ware, 219; S. C. 7 Amer. Jur. 70; Sheridan v. Furbur, Blatchf. & H. 423; Watson v. Christie, 2 Bos. & P. 224.

5 Fuller v. Colby, 3 Wood. & M. 13; Brown v. Howard, 14 Johns. 122.

6 Fuller v. Colby, 3 Wood. & M. 13; U. S. v. Freeman, 4 Mason, 565; Bangs v. Little, 1 Ware, 506; Roberts v. Dallas, Bee, 239.

7 Elwell v. Martin, 1 Ware, 53; Butler v. McLellan, 1 Ware, 219; U. S. v. Ruggles, 5 Mason, 192.

8 Fuller v. Colby, 3 Wood. & M. 14; U. S. v. Wickham, 1 Wash. C. C. 316; Brown v. Howard, 14 Johns. 122; Turner's Case, 1 Ware, 83; Cushman v. Ryan, 1 Story, 91; The Lowther Castle, Hagg. Adm. 384.

9 Sheridan v. Furbur, Blatchf. & H. 429; Brown v. Howard, 14 Johns. 122; Rice v. The Polly & Kitty, 2 Pet. Adm. 420; Thorne v. White, 1 Pet. Adm. 168; Sampson v. Smith, 15 Mass. 365.

10 U. S. v. Cutler, 1 Curt. 501; Payne v. Allen, 1 Sprague, 304; U. S. v. Collins, 2 Curt. 194. And see Rev. Stats. sec. 4611.

11 Carleton v. Davis, 2 Ware (Dav.) 221; Turner's Case, 1 Ware, 83; Fuller v. Colby, 3 Wood. & M. 14.

12 U. S. v. Cutler, 1 Curt. 501.

13 Saunders v. Buckup, Blatchf. & H. 264; Benton v. Whitney, Crabbe, 417; Schelter v. York, Ibid. 443; Forbes v. Parsons, Ibid. 283; U. S. v. Cutler, 1 Curt. 501; Shorey v. Rennell, 1 Sprague, 457.

14 Shorey v. Rennell, 1 Sprague, 407.

15 Roberts v. Skolfield, 3 Ware, 196; Elwell v. Martin, 1 Ware, 53.

16 Aertsen v. The Aurora, Bee, 161; Gould v. Christianson, Blatchf. & H. 507; Carleton v. Davis, 2 Ware (Dav.) 221; S. C. 3 N. Y. Leg. Obs. 86; Turner's Case, 1 Ware, 83; Bangs v. Little, Ibid. 50; Butler v. McLellan, 1 Ware, 219; Shorey v. Rennell, 1 Sprague, 407; U. S. v. Smith, 3 Wash. C. C. 525; Fuller v. Colby, 3 Wood. & M. 1; S. C. 9 Law Rep. 397; Michaelson v. Denison, 3 Day, 294; Sampson v. Smith, 15 Mass. 365; Jarvis v. Sherwood, Bee, 248.

17 The Dubuque, 2 Abb. U. S. 26; U. S. v. Taylor, 2 Sum. 584.

18 Morris v. Cornell, 1 Sprague, 62.

19 Dinsman v. Wilkes, 12 How. 390.

20 Thorne v. White, 1 Pet. Adm. 168; Thompson v. Busch, 4 Wash. C. C. 338.

21 Thomas v. Gray, Blatchf. & H. 505; Thorne v. White, 1 Pet. Adm. 168.

§ 130. Imprisonment of seamen.—It is not one of the ordinary powers of a master to imprison a seaman on shore;[1] the authority to imprison can be exercised only in cases of flagrant offenses, and is justified only by the same necessities which clothe private persons with extraordinary powers, in other cases;[2] it can be exercised only in extreme cases,[3] in aggravated cases;[4] he is not justified in imprisoning seamen merely on suspicion;[5] he has no right to imprison a second mate for refusing orders given as a punishment, no offense having been committed.[6] The imprisonment of a seaman without good cause in a foreign jail, by the master, is at the risk of his being called upon to answer for it on his return home,[7] when he will be held responsible as for a tort,[8] and liable in damages.[9] An unlawful imprisonment on a foreign shore operates as a discharge of the contract.[10] A seaman may be apprehended if he deserts on the voyage,[11] but only in cases of

extreme necessity;[12] he may be apprehended on a justice's warrant.[13] The provisions of the act relative to the apprehension of deserting seamen is auxiliary to the maritime law, and does not supersede it in maritime ports.[14] No law permits the imprisonment of deserters in jails, except on proof of the facts before a competent tribunal.[15] When the master lays a complaint against any of his crew fully and fairly, before the consul, he is not responsible for their imprisonment as for a tort;[16] his action will be deemed justifiable, unless accompanied with malice.[17] The consul has the right to interfere and take seamen from a vessel when their continuance on her would be dangerous to the officers or men.[18] The imprisonment by the consul will not operate to discharge the seamen from their contract.[19] The confinement and cost of commitment are the only penalty for the misconduct of the seaman; there can be no forfeiture of wages superadded.[20] Where seamen are confined in a foreign jail, the master must see that their condition and treatment are such as humanity requires.[21] It is a breach of duty of the master to detain seamen's clothing imprisoned by the local authorities on request of the consul.[22] State statutes authorizing imprisonment of colored seamen adjudged unconstitutional and void.[23]

See SEAMEN, §§ 186, 195.

1 The Elwin Kreplin, 4 Ben. 421; Jordan v. Williams, 1 Curt. 69.

2 Magee v. The Moss, Gilp. 219; U. S. v. Ruggles, 5 Mason, 192; Thorne v. White, 1 Pet. Adm. 172. And see Wilson v. The Mary, Gilp. 31; Johnson v. The Coriolanus, Crabbe, 239; Snow v. Wope, 2 Curt. 301; S. C. 1 Sprague, 300; Sims v. Mariners, 2 Pet. Adm. 393; U. S. v. Ruggles, 5 Mass. 192. And see Rev. Stats. sec. 4599.

3 Jay v. Almy, 1 Wood. & M. 269; The Nimrod, 1 Ware, 9.

4 The David Pratt, 1 Ware, 503; Wood v. The Nimrod, Gilp. 83; Magee v. The Moss, Gilp. 219.

5 Jay v. Almy, 1 Wood. & M. 262.

6 Foye v. Leckie, 1 Sprague, 210.

7 The David Pratt, 1 Ware, 503; Wood v. The Nimrod, Gilp. 83; Magee v. The Moss, Gilp. 219.

8 Jordan v. Williams, 1 Curt. 80; Jay v. Almy, 1 Wood. & M. 262; U. S. v. Ruggles, 5 Mason, 192; Wilson v. The Mary, Gilp. 31; Magee v. The Moss, Gilp. 219; The Nimrod, 1 Ware, 7; The David Pratt, 1 Ware, 503; Loring v. Wope, 2 Curt. 301.

9 The William Harris, 1 Ware, 367; The Elwin Kreplin, 4 Ben. 423; Snow v. Wope, 2 Curt. 301.

10 The Elwin Kreplin, 4 Ben. 424; Schulenburg v. Wessels, 2 E. D. Smith, 70.

11 Cloutman v. Tunison, 1 Sum. 373; Coffin v. Jenkins, 3 Story, 108; Spencer v. Eustis, 21 Me. 519.

12 Magee v. The Moss, Gilp. 219.

13 Brower v. The Malden, Gilp. 294. And see Rev. Stats. sec. 4598. Arrest without warrant—see Rev. Stats. sec. 4599.

14 U. S. v. Turner, 2 Wheel. C. C. 615.

15 The Elwin Kreplin, 4 Ben. 424; Jordan v. Williams, 1 Curt. 69.

16 Jordan v. Williams, 1 Curt. 69; U. S. v. Ruggles, 5 Mason, 192; Jay v. Almy, 1 Wood. & M. 262; Magee v. The Moss, Gilp. 219; Wilson v. The Mary, Gilp. 31; The Nimrod, Gilp. 83; The David Pratt, 1 Ware, 503; Snow v. Wope, 2 Curt. 304; Shorey v. Rennell, 1 Sprague, 416; The Elwin Kreplin, 4 Ben. 423; Johnson v. The Coriolanus, Crabbe, 239.

17 Wilkes v. Dinsman, 7 How. 129; The Nimrod, 1 Ware, 9; The Mary Belle Roberts, 3 Sawy. 415; U. S. v. Ruggles, 5 Mason, 192; U. S. v. Coffin, 1 Sim. 394; U. S. v. Netcher, 1 Story, 307; U. S. v. Riddle, 4 Wash. C. C. 644.

18 Tingle v. Tucker, Abb. Adm. 519; The Nimrod, 1 Ware, 9.

19 The Elwin Kreplin, 9 Blatchf. 446; Jordan v. Williams, 1 Curt. 69.

20 Brower v. The Maiden, Gilp. 297; Bray v. The Atalanta, Bee, 48; The David Pratt, 1 Ware, 503; Wood v. The Nimrod, Gilp. 83; Magee v. The Moss, Gilp. 219; Sherwood v. McIntosh, 1 Ware, 118; Brower v. The Maiden, Gilp. 297; The Atalanta, Bee, 48. See SEAMEN, § 192. And see Rev. Stats. secs. 4598, 4603.

21 Shorey v. Rennell, 1 Sprague, 407; Brower v. The Maiden, Gilp. 297; The Atalanta, Bee, 48; Wood v. The Nimrod, Gilp. 83.

22 Jordan v. Williams, 1 Curt. 69; The Marden, 1 Gilp. 294.

23 Elkison v. Dellesseline, 2 Wheel. C. C. 56; The Cynosure, 1 Sprague, 88; S. C. 7 Law Rep. 226.

§ 131. Disrating seamen.—The master has the authority to disrate either officers or seamen for sufficient reasons,[2] and allot them to other service,[2] but not without adequate cause;[3] the power is remedial, not penal.[4] A subordinate officer may be removed and assigned to the duties of a common sailor.[5] The master may remove the mate appointed by him for incompetency.[6] A second mate refusing to perform his duty may be removed to the forecastle.[7] Where the cook has been guilty of some misconduct, but an entry was not made on the log-book at the time, the master has no right to offer the alternative of a discharge in a foreign port or be disrated.[8] A single instance of excess is not a disqualification so as to authorize the master to degrade a seaman.[9]

1 The Exchange, Blatchf. & H. 366; Mitchell v. The Orozimbo, 1 Pet. Adm. 250; The Mentor, 4 Mason, 102; U. S. v. Savage, 5 Mason, 460; The Alonzo, 3 Ware, 318; Burton v. Salter, 11 Law Rep. N. S. 148; Atkins v. Burrows, 1 Pet. Adm. 244.

2 The Exchange, Blatchf. & H. 369; 1 Ware, 411; Atkins v. Burrows, 1 Pet. Adm. 244.

3 The Mentor, 4 Mason, 84; Allen v. Hallet, Abb. Adm. 576; The Exchange, Blatchf. & H. 366; Shermond v. McIntosh, 1 Ware, 109; Mitchell v. The Orozimbo, 1 Pet. Adm. 250.

4 Smith v. Jordan, 11 Law Rep. N. S. 204.

5 Allen v. Hall, Abb. Adm. 576; Shermond v. McIntosh, 1 Ware, 109.

6 Wood v. The Nimrod, Gilp. 83; Atkins v. Burrows, Pet. Adm. 244.

7 Morris v. Cornell, 1 Sprague, 62.

8 The Penang, 4 Sawy. 100.

9 Sherwood v. McIntosh, 1 Ware, 115; The Exeter, 2 C. Rob. 261.

§ 132. Discharge of seamen abroad.—The master cannot lawfully discharge a seaman abroad without just and valid reasons,[1] nor without the intervention of the consul.[2] Discharge in a foreign port is not favored unless approved by the resident American consul, and with the consent of the seamen.[3] The burden is on the master to prove the motives, and show that they were just and reasonable.[4] The certificate of the consul that the discharge was granted on seaman's consent is conclusive,[5] unless the conduct of the consul is shown to be corrupt or fraudulent.[6] The contents of the consul's written consent may be proved by parol.[7] The payment of additional wages to the consul discharges the owner's liability therefor, but a charge for exchange cannot be deducted.[8] If a consul discharges a seaman without the payment of the three months' wages, he must make an official entry both upon the list of the crew and upon the ship's articles, or the owner will be liable for the extra wages, pursuant to act of Congress.[9] The consul has no right to detain a seaman in prison after he has discharged him at the request of the master.[10] Seamen on board vessels of war are not entitled to a pecuniary assistance from consul as extra wages.[11] A seaman discharged abroad is not bound by the agreement of his discharge as to rate of wages, but is entitled to a *quantum meruit*.[12] If, pending the voyage, commerce with the port of destination is interdicted, no wages are due, but if retained in service of vessel they are entitled to compensation; and if, after detention, they are discharged in a foreign port, they are entitled to two months' pay, according to the new contract of hire.[13] A master may leave a minor, a stowaway, in charge of the consul in a foreign port, without rendering himself liable to the payment of the extra wages.[14] The master is authorized to discharge a seaman for mutinous and rebellious conduct, gross dishonesty or embezzlement, theft or habitual drunkenness, and for being a habitual stirrer-up of quarrels.[15] The misconduct must be continued or repeated, or of an aggravated character.[16] A discharge for criminal conduct is a bar to any continuing claim for wages.[17]

See SEAMEN, § 163.

1 Nieto *v.* Clark, 1 Cliff. 147; Hutchinson *v.* Coombs, 1 Ware, 65; The Exeter, 2 C. Rob. 261.

2 Anonymous, 7 Opin. Att. Gen. 349.

3 The Atlantic, Abb. Adm. 451; Nieto *v.* Clark, 1 Cliff. 145; Jay *v.* Almy, 1 Wood. & M. 262. And see Rev. Stats. secs. 4580, 4581.

4 Nieto *v.* Clark, 1 Cliff. 145; Jay *v.* Almy, 1 Wood. & M. 268; Hutchinson *v.* Coombs, 1 Ware, 65.

5 The Atlantic, Abb. Adm. 451; Lamb *v.* Briard, Ibid. 389. But see Campbell *v.* The Uncle Sam, McAll. 77; Hutchinson *v.* Coombs, 1 Ware, 65. And see Rev. Stats. sec. 4532.

6 Lamb *v.* Briard, Abb. Adm. 369.

7 U. S. *v.* Parsons, 1 Low. 107; Campbell *v.* The Uncle Sam, McAll. 80; Hutchinson *v.* Coombs, 1 Ware, 65.

8 Drew *v.* Pope, 2 Sawy. 72. And see Rev. Stats. sec. 4580.

9 Miner *v.* Harbeck, Abb. Adm. 546.

10 Jordan *v.* Williams, 1 Curt. 69; S. C. 4 Law Rep. N. S. 421.

11 Anonymous, 3 Opin. Att. Gen. 683.

12 Mayshew *v.* Terry, 1 Sprague, 584.

13 The Saratoga, 2 Gall. 164; S. C. 6 Alb. L. J. 12.

14 Luscom *v.* Osgood, 1 Sprague, 82; S. C. 7 Law Rep. 132.

15 The Cornelia Amsden, 5 Ben. 320; Smith *v.* Treat, 2 Ware, (Dav.) 270; Thorne *v.* White, 1 Pet. Adm. 168; Hutchinson *v.* Coombs, 1 Ware, 71; Relf *v.* The Maria, 1 Pet. Adm. 186; The Mentor, 4 Mason, 91; Black *v.* The Louisiana, 2 Pet. Adm. 268; Sherwood *v.* The Commerce, 1 Pet. Adm. 160; The Nimrod, 1 Ware, 18; Orne *v.* Townsend, 4 Mason, 541; The Lady Campbell, 2 Hagg. Adm. 5; The Vibilia, 1 W. Rob. 1; S. C. 2 Hagg. Adm. 228; The Exeter, 2 C. Rob. 261. And see Rev. Stats. sec. 4602.

16 The Maria, Blatchf. & H. 331; The Mentor, 4 Mason, 102; Drysdale *v.* The Ranger, Bee, 148; Nieto *v.* Clark, 1 Cliff. 147; Thorne *v.* White, 1 Pet. Adm. 175; Relf *v.* The Maria, 1 Pet. Adm. 186; Black *v.* The Louisiana, 2 Pa. 268; Sherwood *v.* McIntosh, 1 Ware, 115; The Exeter, 2 C. Rob. 261.

17 Tingle *v.* Tucker, Abb. Adm. 519; Miner *v.* Harbeck, Ibid. 546; Campbell *v.* The Uncle Sam, McAll. 77; The America, Blatchf. & H. 185; The Pacific, Ibid. 187.

§ 133. Rights of master, generally.—A master under special contract for "all services and privileges," has no right to traffic on his own account;[1] so where he acts as supercargo.[2] If engaged under contract for monthly wages and commissions, he is entitled to commissions on money received for demurrage.[3] A commission to a master on sales and investments, does not entitle him to a commission on freight.[4] He has the same right in the freight money as a consignee has in the goods for any liability incurred,[5] and may retain the freight where the shipping papers make him directly responsible for the payment of the seamen.[6] The owner is not bound to insure the right of the master to primage on freight.[7] The master has no right to retain possession of goods liable for a general average till it is paid.[8] He may recover for expenses as agent of owners while in the service,[9] and may recover advances made for payment of the crew on a former voyage.[10] But he cannot recover for his expenses in getting home from a foreign port where he was discharged.[11] The privilege of carrying goods for himself or others, he receiving the freight, depends on usage,[12] so, the right to primage on freight depends on usage.[13]

See CARRIER.

1 Mathewson *v.* Clarke, 6 How. 122.

2 Mathewson v. Clarke, 6 How. 122.
3 Woodbury v. Brazier, 48 Me. 302.
4 Miller v. Livingston, 1 Caines, 349.
5 Lewis v. Hancock, 1 Mass. 72.
6 Goodridge v. Lord, 10 Mass. 483.
7 Pedrick v. Fisher, 1 Sprague, 565.
8 Eckford v. Wood, 5 Ala. 136.
9 Woodbury v. Brazier, 48 Me. 302.
10 Kohler v. Wright, 7 Bosw. 318.
11 Woodbury v. Brazier, 48 Me. 302.
12 King v. Lenox, 19 Johns. 235.
13 Vose v. Morton, 5 Gray, 594; Rennell v. Kimball, 5 Allen, 356; Scott v. Miller, 5 Scott, 13; Charleton v. Cotesworth, Ryan & M. 175.

§ 134. Rights and liabilities, as owner for the voyage.—Where a vessel is navigated under the entire control and for the exclusive benefit of the master, he is *pro hac vice* the owner, and liable for supplies and repairs,[1] and is liable as a carrier.[2] The master of a ship, who was also owner, let under contract of affreightment, is responsible for damages sustained during the voyage.[3] Where a vessel is let to a master on shares, he is owner for the voyage, and liable for supplies,[4] but those furnishing the supplies must have notice thereof.[5] Where the master takes the ship on shares he becomes trustee of the other owners' shares thereof when received.[6] A master taking a vessel on shares, paying for the victualing, manning and expenses of the voyage and navigation, and dividing the gross proceeds of her employment equally with the owners, is deemed owner for the voyage, and may let or charter or otherwise employ her.[7] The master does not become owner *pro hac vice* unless the vessel is let to him for a term of time, giving him entire control.[8] He is not owner for the voyage when he engages for a specific sum.[9] The master and seamen of a whale ship, who ship on shares instead of wages, do not thereby become partners with the owners.[10] When the master is owner for the voyage, he is not agent for the owners.[11] If he has not any control over the vessel, an action for freight may be maintained in the name of the owners.[12] The usage that the master should have a lien on the "lays" of the seamen for supplies furnished, is reasonable. It is not lost by delivering up the vessel to the owners' agent.[13]

See ANTE, § 50.

1 Jones v. Blum, 2 Rich. 475; Webb v. Peirce, 1 Curt. 104; S. C. 5 Law Rep. N. S. 9; Mayo v. Snow, 2 Curt. 102; S. C. 7 Law Rep. N. S. 495; Sproat v. Donnell, 26 Me. 185; Skolfield v. Potter, 2 Ware, 395; Thompson v. Snow, 4 Me. 264. See CHARTER PARTY.

2 Tyler v. Holmes, 38 Me. 258; Nash v. Parker, 38 Me. 489; Decker v. Furniss, 3 Duer, 291; Lincoln v. Wright, 23 Pa. St. 76.

3 Eames v. Cavaroc, 1 Newb. 528; Mott v. Ruckman, 3 Blatchf. 71.

4 Webb v. Peirce, 1 Curt. 104; Thompson v. Snow, 4 Green. 264; Winsor v. Cutts, 7 Id. 261; Houston v. Darling, 4 Shep. 413; Kenzel v. Kirk, 37 Barb. 113; Lyman v. Redman, 10 Shep. 289.

5 Kenzel v Kirk, 37 Barb. 113.

6 Williams v. Williams, 23 Me. 17.

7 The Tribune, 3 Sum. 146; Emery v. Hersey, 4 Me. 407; Winsor v. Cutts, 7 Me. 261; Thompson v. Snow, 4 Me. 264.

8 Harding v. Souther, 12 Cush. 307.

9 The Nathaniel Hooper, 3 Sum. 543.

10 Joy v. Allen, 2 Wood. & M. 306; The Crusader, 1 Ware, 441; Bishop v. Shepherd, 23 Pick. 492; Thompson v. Snow, 4 Me. 264; Webb v. Peirce, 1 Curt. 104; Baxter v. Rodman, 3 Pick. 435; Grozier v. Atwood, 4 Pick. 234; The Larch, 2 Curt. 434. See SEAMEN.

11 Webb v. Peirce, 1 Curt. 111; Thompson v. Hamilton, 12 Pick. 425; Sproat v. Donnell, 26 Me. 185; Thompson v. Snow, 4 Me. 264; Cutler v. Winsor, 6 Pick. 335; Perry v. Osborne, 5 Pick. 422; Manter v. Holmes, 10 Met. 462; Taggard v. Loring, 16 Mass. 336.

12 Sims v. Howard, 40 Me. 276.

13 Batney v. Coffin, 3 Pick. 115.

§ 135. Wages.—The rule, that "freight is the mother of wages," does not apply to the master,[1] even in case of capture,[2] or shipwreck;[3] but wages cease on the capture of the vessel;[4] when acting as agent of the owners after capture, he is, however, entitled to compensation for his services and expenses,[5] and he is entitled to extra allowance, when serving out of the line of his duty;[6] but wages involved in an illegal transaction follow the fate of the vessel.[7] After abandonment on loss of the vessel, if accepted, the underwriters, as owners, are liable to the payment of the wages of the master and crew, for the rest of the voyage.[8] Trustees who hold title to the vessel, and control and manage her, for the benefit of themselves and others, are liable for the wages of the master appointed by them;[9] he is a mariner in the sense of being entitled, if a citizen, to three months additional wages when discharged in a foreign port;[10] yet he has no valid claim for wages till he has rendered a full account of receipts, disbursements, and expenditures.[11] The master may recover a proportionate part of his salary when his services do not commence and terminate with the season.[12] The claim of the master of a foreign vessel to be paid his wages concurrent with the seamen, and in preference to the claims of material-men, disallowed.[13]

1 Moore v. Jones, 15 Mass. 424.

2 Moore v. Jones, 15 Mass. 424.

3 Hawkins v. Turzell, 34 Eng. L. & E. 195; S. C. 5 Ellis & B. 883; Smith v. Gilbert, 4 Day, 105.

He is liable to third persons for acts or negligence of persons employed in the navigation of the vessel.[4] If a loss accrues when the mate is unlawfully displaced, the master is accountable.[5] While the vessel is in charge of a pilot he is not liable for damage by mismanagement.[6] A usage of insurance companies, requiring two pilots, and forbidding the master to act as one of the two, is a mere matter of contract, and cannot affect the rights of third parties.[7] Where, on a voyage, delay was caused and damage ensued, and a loss in the selling of the cargo, the question of his liability is to be determined by the facts.[8] An account against a vessel is not chargeable to the master unless presented within reasonable time.[9]

1 Knox v. The Ninetta, Crabbe, 534.

2 Knox v. The Ninetta, Crabbe, 534.

3 Brown v. Smith, 12 Cush. 366.

4 Dennison v. Seymour, 9 Wend. 8.

5 Atkyns v. Burrows, 1 Pet. Adm. 248.

6 Smith v. Condry, 1 How. 28; Snell v. Rich, 1 Johns. 305.

7 Bissell v. Mepham, 1 Woolw. 225.

8 The Gentleman, 1 Blatchf. 196, reversing S. C., Olcott, 110.

9 Barnes v. The James, 1 Bald. 544.

§ 138. Liability on contracts.—The master is responsible on all contracts made by him for the ship;[1] he can exempt himself from personal liability only by expressly confining the credit to the owner,[2] for where the creditor looks exclusively to the owners, they alone are liable;[3] but if they look to him alone, he is liable.[4] In the absence of an express covenant the master is not liable for a deficiency on a bottomry bond.[5]

1 Rich v. Coe, Cowp. 636; Marquand v. Webb, 19 Johns. 89; James v. Bixby, 11 Mass. 34; Stocker v. Corlett, 1 Const. Rep. 81; Snyder v. Hurd, 8 Tex. 98; Watkinson v. Laughton, 8 Johns. 213; The Leonidas, Olcott, 12.

2 Snyder v. Hurd, 8 Tex. 98.

3 Farmer v. Davies, 1 Term Rep. 108; Farrel v. McClea, 1 Dall. 392.

4 Garnham v. Bennet, 2 Strange, 816; Thorn v. Hicks, 7 Cow. 697; Hussey v. Allen, 6 Mass. 163; James v. Bixby, 11 Mass. 34; Wainwright v. Crawford, 4 Dall. 226.

5 The Irma, 6 Ben. 1; The Jonathan Goodhue, Swab. 524; The Salacia, Lush. 545.

§ 139. Liability for misconduct.—The master is liable for his own acts,[1] for unskillfulness and for wrong done to officers or crew,[2] but he is not personally responsible for the consequences of an error of judgment in furnishing an insufficiency of supplies, whereby he was compelled to return to the home port.[3] He is responsible to the owners for damages paid by them to third parties by

reason of his misconduct,[4] as by smuggling,[5] or embezzlement,[6] for the net value of the goods embezzled, at the place of delivery.[7] He is liable for barratry,[8] and it is not essential that it should be in his own interest.[9] Barratry is an act by the master or crew of a vessel, for some unlawful or fraudulent purpose, contrary to duty, whereby the owners sustain an injury, and may be committed against the owners of the voyage.[10] Moral fraud is not an essential ingredient, but only unfaithfulness to duty;[11] and illegal acts, when not fraudulent or criminal, are not barratrous.[12] Any trick, cheat, or fraud, or any crime or willful breach of law, to the prejudice of the owner, is barratry.[13] Barratry may be by running away with the property, or smuggling, so as to forfeit the vessel and cargo, or any fraudulent destruction or loss of them, though not by neglect.[14] An attempt at recapture is not barratry.[15] Where the master, upon representations of the debtor of the owner, sailed to a distant port without orders to recover the cargo of the debtor, it was held not misconduct.[16] The master is liable in damages for the conversion of a lighter.[17]

1 The Rebecca, 1 Ware, 195; Hussey v. Christie, 9 East, 426.

2 Watkinson v. Langton, 8 Johns. 213; Morse v. Slue, 1 Vent. 190; Barclay v. Cuculla, 3 Doug. 389.

3 Marshall v. Crawford, 4 Sawy. 37.

4 Purviance v. Angus, 1 Dall. 180.

5 Willard v. Dorr, 3 Mason, 161; Freeman v. Walker, 6 Me. 68.

6 Joy v. Allen, 2 Wood. & M. 303.

7 Watkinson v. Langton, 8 Johns. 213.

8 Joy v. Allen, 2 Wood. & M. 303.

9 Dederer v. Delaware Ins. Co. 2 Wash. C. C. 61.

10 Marcardier v. Chesapeake Ins. Co. 8 Cranch, 39.

11 Patapsco Ins. Co. v. Coulter, 3 Pet. 222. Contra, Dederer v. Delaware Ins. Co. 2 Wash. C. C. 61.

12 Dederer v. Delaware Ins. Co. 2 Wash. C. C. 61.

13 Wilcocks v. Union Ins. Co. 2 Binn. 574; S. C. 4 Amer. Dec. 480.

14 Joy v. Allen, 2 Wood. & M. 320; Vallejo v. Wheeler, Cowp. 143; 1 Strange, 581; 2 Ld. Raym. 1349; 3 Wheat. 171; 4 Term Rep. 33.

15 Dederer v. Delaware Ins. Co. 2 Wash. C. C. 61.

16 Nisson v. Wessels, 5 Ben. 433.

17 The Florence, 23 Int. Rev. Rec. 105.

§ 140. Liability for offenses.—Maliciously and without justifiable cause forcing an officer or mariner on shore in a foreign port; leaving an officer or mariner behind in a foreign port; and refusing to bring home all officers and mariners in a condition, and willing to return, are offenses for which the master will be held liable,[1] the offense may

be committed without physical force.[2] "Maliciously," means "wantonly," that is, with a willful disregard of right and duty,[3] willfully against a knowledge of duty.[4] "Justifiable cause" implies a case of moral necessity, for the safety of ship and crew, or the due performance of the voyage,[5] such as mutinous and rebellious conduct, gross dishonesty or embezzlement, theft, habitual drunkenness, or habitually stirring up quarrels to the destruction of order and discipline.[6] He is justified in the immediate discharge of a seaman who has attempted rape on a female passenger,[7] so drunkenness may justify the discharge of the mate, but not the sending him ashore while incapable of taking care of himself.[8] The master or commander of a vessel is in general not liable to an action for an assault and battery, in chastising a seaman, where he acted under a sincere conviction that it was necessary to the preservation of discipline, and not from passion or revenge;[9] but if the punishment is aggravated by malice, or a vindictive feeling, or a desire to oppress, the master will be liable for an assault.[10] Incompetency to perform duties is no justification for the infliction of punishment.[11] To "cast away," or to "destroy," are synonymous terms: both mean such an act as causes the vessel to perish—to be lost—to be irrecoverable by ordinary means.[12] Allowing a seaman, who had fallen off the yard-arm, to drown, without making any attempt at his rescue, is manslaughter.[13]

1 U. S. v. Netcher, 1 Story, 307; Wilkes v. Dinsman, 7 How. 128; The Mary Belle Roberts, 3 Sawy. 485. And see Rev. Stats. sec. 5363.

2 U. S. v. Riddle, 4 Wash. C. C. 644.

3 U. S. v. Ruggles, 5 Mason, 192; U. S. v. Coffin, 1 Sum. 398; U. S. v. Taylor, 2 Sum. 587; Blunt v. Little, 3 Mason, 102.

4 U. S. v. Cutler, 1 Curt. 501; U. S. v. Coffin, 1 Sum. 394; U. S. v. Taylor, 2 Sum. 584.

5 U. S. v. Coffin, 1 Sum. 534; Jones v. Sears, 2 Sprague, 45.

6 Smith v. Treat, 2 Ware (Dav.) 266; Sprague v. Kain, Bee, 143, 184; The Cornelia Anderson, 5 Ben. 320; Thorne v. White, 1 Pet. Adm. 168; Black v. The Louisiana, 2 Ibid. 268; The Vibilia, 1 W. Rob. 1; Orne v. Townsend, 4 Mason, 541; Sherwood v. McIntosh, 1 Ware, 115; The Lady Campbell, 2 Hagg. Adm. 5; Fuller v. Colby, 3 Wood. & M. 11; Hutchinson v. Coombs, 1 Ware, 71.

7 Nieto v. Clark, 1 Cliff. 145.

8 The Eldorado, 1 Low. 289.

9 Dinsman v. Wilkes, 12 How. 390; Sheridan v. Furbur, Blatchf. & H. 422; U. S. v. Cutler, 1 Curt. 501; U. S. v. Freeman, 4 Mason, 505; Thorne v. White, 1 Pet. Adm. 168; Morris v. Cornell, 1 Sprague, 62; U. S. v. Taylor, 2 Sum. 584; Thompson v. Busch, 4 Wash. C. C. 338.

10 Dinsman v. Wilkes, 12 How. 390.
11 Payne v. Allen, 1 Sprague, 304.
12 U. S. v. Johns, 1 Wash. C. C. 363; S. C. 4 Dall. 412; U. S. v. Van Raust, 3 Wash. C. C. 146.
13 U. S. v. Knowles, 4 Sawy. 517.

§ 192. Offenses of seamen.
§ 193. Endeavor to make revolt.
§ 194. Revolt or mutiny of crew.
§ 195. Effect of imprisonment for offenses.

§ 141. Seamen, who are.—All persons employed in the navigation of a vessel, or upon a voyage, other than the master and mates, are deemed seamen,[1] including cabin-boys, cooks,[2] stewards, chambermaids,[3] carpenters, coopers, and firemen, pilots, surgeon, and boatswain,[4] the clerk of a steamboat,[5] all on board employed in the equipment or preservation of the vessel;[6] so a female cook is a mariner,[7] and foreigners employed on ships of the United States are mariners,[8] and are not disqualified from becoming engineers and pilots in American steam passenger vessels.[9] Persons shipped as sealers are mariners.[10]

1 The Highlander, 1 Sprague, 588; The Jane and Matilda, 1 Hagg. Adm. 187; The Prince George, 3 Ibid. 376; The Ocean Spray, 4 Sawy. 112.

2 Allen *v.* Hallet, Abb. Adm. 576; The Mentor, 4 Mason, 84; The Orozimbo, Abb. Adm. 576; Trump *v.* The Thomas, Bee, 86.

3 Gurney *v.* Crockett, Abb. Adm. 490.

4 U. S. *v.* Thompson, 1 Sum. 170; Ross *v.* Walker, 2 Wils. 264; Wheeler *v.* Thompson, 1 Strange, 707; Sheridan *v.* Furbur, Blatchf. & H. 425; The Lord Hobart, 2 Dods. 103.

5 The Sultana, 1 Brown, 13; Trainor *v.* The Superior, Gilp. 514; The Prince George, 3 Hagg. Adm. 376; Mills *v.* Long, 2 Dods. 105; Wilson *v.* Ohio, Gilp. 505; Ross *v.* Walker, 2 Wils. 264.

6 Gurney *v.* Crocket, Abb. Adm. 492; Hindman *v.* Shaw, 2 Pet. Adm. 264; The D. C. Salisbury, Olcott, 75; Trainor *v.* The Superior, Gilp. 514; The Lord Hobart, 2 Dods. 103; Shaw *v.* The Leithe, Bee, 424; The Prince George, 3 Hagg. Adm. 376; Mills *v.* Long, 2 Dods. 100; Turner's Case, 1 Ware, 83; U. S. *v.* Thompson, 1 Sum. 168; Sheridan *v.* Furbur, Blatchf. & H. 425.

7 Gurney *v.* Crockett, Abb. Adm. 492.

8 Matthews *v.* Offley, 3 Sum. 115.

9 Engineers of Amer. St. Vessels. 11 Opin. Att. Gen. 488.

10 The Ocean Spray, 4 Sawy. 105.

§ 142. Crew, who included.—The crew includes the officers as well as the seamen,[1] but one who secretes himself on board till after the voyage has commenced is not included.[2] A minor who ships without knowledge of his parents "belongs" to the vessel in the sense of his being liable to indictment for offenses;[3] but a contract by such minor to serve as a seaman is voidable at any time before its completion.[4] A seaman who has passed his examination at the naval rendezvous, but has not passed on the receiving ship, is not "enlisted."[5] Where a vessel of the United States is duly enrolled and licensed, and has been engaged for years in navigating between domestic ports, the presumption is that her crew were hired in a domestic

port.[6] Where a vessel arrives at a port in the course of a cruise, which is not there ended, the presumption is that her original crew continued attached to her.[7]

1 U. S. *v.* Winn, 3 Sum. 209; S. C. 1 Law Rep. 63.
2 U. S. *v.* Small, 2 Curt. 241.
3 U. S. *v.* Lockman, 1 Law Rep. N. S. 151.
4 The Hotspur, 3 Sawy. 194.
5 U. S. *v.* Thompson, 2 Sprague, 103.
6 Franconet *v.* The F. W. Backus, Newb. 1.
7 La Armistad de Rues, 5 Wheat. 385.

§ 143. Power of seamen to contract.—Mariners may contract and bind themselves, to the same degree as any other party on specific wages, and for a specified time, or for a voyage, or a cruise,[1] at a specified rate of wages;[2] the rate is an essential part of the written contract.[3] A cruise is a voyage for a given purpose,[4] it begins when the vessel breaks ground for the purpose of sailing.[5] Where no wages are stipulated, he may either prove by parol what wages were agreed on, or may, under the Act of Congress, claim the highest rate payable at the port of shipment within three months next preceding the date of the articles.[6] So as to seamen on lake vessels,[7] but this section does not apply to fishing vessels,[8] and parol evidence is not admissible to prove an agreement for a lower rate,[9] nor is evidence of a further compensation by way of custom admissible.[10] The shipping articles are not the sole evidence of the seaman's rights. The actual bargain made between shipping agent and seamen binds the vessel.[11] A mariner may prove by parol evidence that the shipping articles do not truly describe the voyage, and may recover the wages for which he contracted, and a mate is within the rule.[12] The Court, in the absence of a specified rate, may fix the wages on the principles of *quantum meruit*.[13] The burden of proof of advance wages paid to the shipping agent, and that such agent was authorized to receive it, is on the respondent.[14] Where two distinct contracts for distinct voyages are made at the same time, and one only is reduced to writing, the other may be proved by parol.[15] Time, accidentally omitted, may be supplied by oral evidence.[16] Where they enter on a voyage without signing shipping articles, a contract is implied, which binds them till the voyage is terminated.[17] Where seamen were brought to a place by deceit, and refused to work, and the master agreed to pay them extra, the master and owner were bound by the master's agreement.[18]

1 The Atlantic, Abb. Adm. 471; The Mariner's Case, 3 Mod. 379; Howe v. Napier, 4 Barr. 940; The Sydney Cove, 2 Dods. 1; The Mona, 1 W. Rob. 137; The Ruby Grove, 2 Ibid. 52; Thompson v. The Catharine, 1 Pet. Adm. 104.

2 The Atlantic, Abb. Adm. 471.

3 The Atlantic, Abb. Adm. 471; Johnson v. Dalton, 1 Cow. 543; Bartlett v. Wyman, 14 Johns. 260; Wickham v. Blight, Gilp. 452.

4 The Brutus, 2 Gall. 539; Anonymous, 1 Hall L. J. 207; Brown v. Jones, 2 Gall. 477; Magee v. The Moss, Gilp. 219; Douglass v. Eyre, Gilp. 147, explaining Syers v. Bridge, 2 Doug. 527.

5 The Brutus, 2 Gall. 539; The Good Hope, 1 Pet. Adm. 327.

6 The Warrington, Blatchf. & H. 337; White v. Wilson, 2 Bos. & P. 116; Montgomery v. Tyson, 1 Low. 131; The Harvey, 2 Hagg. Adm. 79; Jameson v. The Regulus, 1 Pet. Adm. 212; The Crusader, 1 Ware, 437.

7 The City of Fremont, 2 Biss. 415. See Rev. Stats. sec. 4528.

8 The Ianthe, 3 Ware, 126; and compare The Australia, Ibid. 240.

9 The Crusader, 1 Ware, 437.

10 Bogert v. Canman, Anth. N. P. 97.

11 The Lola, 6 Ben. 142.

12 The Cypress, Blatchf. & H. 87; Harden v. Gordon, 2 Mason, 541; The Juliana, 2 Dods. 504; The Minerva, 6 C. Rob. 396; Page v. Sheffield, 2 Curt. 380, distinguishing Veacock v. McCall, Gilp. 329; White v. Wilson, 2 Bos. & P. 116. And see The Quintero, 1 Low. 40; Wope v. Hemmenway, 1 Sprague, 300.

13 Allen v. Hitch. 2 Curt. 147; The William Martin, 1 Sprague, 564.

14 Holmes v. Dodge, Abb. Adm. 60; and see Rev. Stats. sec. 4532.

15 Page v. Sheffield. 2 Curt. 378; McCulloch v. Girard, 4 Wash. C. C. 290; Seago v. Deane, 4 Bing. 459; Lapham v. Whipple, 8 Met. 59.

16 Montgomery v. Tyson, 1 Low. 131; Wickham v. Blight, Gilp. 452; Taber v. U. S. 1 Story, 1; The Atlantic, Abb. Adm. 474.

17 Jansen v. The Heinrich, Crabbe, 226.

18 The Brookline, 1 Sprague, 104; S. C. 8 Law Rep. 70.

§ 144. Shipping articles.—The maritime law, as a general rule, requires seamen's contracts to be in writing.[1] A penalty is prescribed, by statute, for shipping seamen without written articles.[2] This penalty extends to the merchant marine upon the lakes and public navigable waters connecting the same.[3] By the Revised Statutes, agreements of seamen are required to be signed in the presence of the shipping commissioners.[4] They are to be signed by seamen engaged in the coasting trade.[5] They need not be signed in the presence of the shipping commissioner when such voyage is to a port in the West Indies,[6] nor upon vessels engaged only in and for voyages coastwise between the Atlantic ports of the United States.[7] The word "State" includes an organized territory.[8] The term "voyage" is not applicable to tugs making short trips from one body of water to another.[9] The provisions of section 23 of the Shipping Commis-

sioners' Act, providing for the disposition of wages of deserting seamen, and imposing certain duties on the owners and masters of vessels, do not apply to cases embraced in section 55.[10] A person not a shipping commissioner, who ships seamen for a vessel of which he is not owner or consignee or master, is liable to the penalty under the act of Congress.[11] A seaman shipping in a foreign port is not required to sign articles.[12] Seamen may recover the value of privileges granted supplementary to shipping articles and not inserted, the act of Congress not requiring their insertion;[13] but subsequent agreements are not binding on seamen,[14] and verbal stipulations are not enforced.[15] Shipping on a whaling voyage need not be in writing.[16] The court may dispense with the literal fulfillment of conditions, and may regard acts substituted by agreement, express or implied, or which are compelled by the exigency of the voyage, to be equivalent to an exact compliance with the articles.[17] The provisions of the shipping act apply as well to vessels engaged in the coastwise as to those engaged in the foreign trade.[18]

1 The City of Mexico, 7 Ben. 33; The Crusader, 1 Ware, 437; Page v. Sheffield, 2 Curt. 330; Bartlett v. Wyman, 14 Johns. 260, and see The Isabella, 2 C. Rob. 241. See Rev. Stats. secs. 4509–4523. Form of articles—see Rev. Stats. sec. 4612.

2 The Cypress, Blatchf. & H. 83; The Warrington, Ibid. 335; The Sarah Jane, Ibid. 401; Magee v. The Moss, Gilp. 219; Snow v. Wope, 2 Curt. 301; Wope v. Hemenway, 1 Sprague, 300; Jameson v. The Regulus, 1 Pet. Adm. 212; Walton v. The Neptune, Ibid. 142; Bartlett v. Wyman, 14 Johns. 260; Johnson v. Dalton, 1 Cow. 543. See Rev. Stats. sec. 4521.

3 Wolverton v. Lacy, 8 Law Rep. N. S. 672.

4 The Grace Lothrop, 1 Holmes, 342; N. S. v. The City of Mexico, 11 Blatchf. 480; S. C. 7 Ben. 31. And see Rev. Stats. sec. 4512.

5 U. S. v. Hamilton, 1 Mason, 443; U. S. v. Haines, 5 Mason, 272; Milligan v. The B. F. Bruce, Newb. 539; Oliver v. Alexander, 6 Peters, 143; Gladding v. Constant, 1 Sprague, 73; The Crusader, 1 Ware, 437. And see Rev. Stats. sec. 4520.

6 U. S. v. The Grace Lothrop, 95 U. S. 527.

7 U. S. v. Smith, 95 U. S. 536.

8 In re Bryant, Deady, 118.

9 The John Martin, 2 Abb. U. S. 172; The B. F. Bruce, Newb. 539.

10 Stevenson v. Hare, 2 Sawy. 583. See Shipping Commissioners' Acts, Rev. Stats. secs. 4550, 4604.

11 U. S. v. Idell, 16 Int. Rev. Rec. 147. Unlawful shipments void—see Rev. Stats. sec. 4523.

12 D'Olivera, 1 Gall. 474. See Rev. Stats. sec. 4517.

13 The Warrington, Blatchf. & H. 339; Parker v. The Calliope, 2 Pet. Adm. 272.

14 The Lola, 6 Ben. 142.

15 Harden v. Gordon, 2 Mason, 545, explaining The Isabella, 2 C. Rob. 241.

16 The Atlantic, Abb. Adm. 451.

17 Reed v. Hussey, Blatchf. & H. 538; The George Home, 1 Hagg. Adm. 370; Harden v. Gordon, 2 Mason, 541; The Minerva, 1 Hagg. Adm. 347.

18 U. S. v. Idell, 16 Int. Rev. Rec. 147; U. S. v. Smith, 95 U. S. 536.

§ 145. Description of voyage.—A voyage is a transit to be performed by the seamen;[1] it is a technical phrase, and imports a definite commencement and ending.[2] Shipping articles must declare explicitly where the voyage is to commence and where to terminate,[3] and if they fail to do so, they are not binding, if contrary to justice.[4] Where the description is not in compliance with the requirements of the statute, the seamen may leave at any time.[5] Where articles were signed for a voyage to a foreign port for a cargo, and to return to the United States, the voyage is not ended till arrival at the port of discharge.[6] The word "or" in shipping articles means one or the other of two, not both,[7] and the words "or elsewhere," are either word for uncertainty for all ports beyond the ports particularly named, or are construed in subordination to the principal voyage.[8] Where the voyage was specified to and from certain ports, and also for a specified time, the seamen were bound until the vessel should return "to a final port of discharge in the United States."[9] Articles describing the voyage, from New York to Barbadoes, and a market construed by the light of the usages of trade, held to mean to any island in the West Indies.[10] A description "to and from the port of Boston to Valparaiso and other ports, at and from thence home, direct, or via ports in the East Indies, or Europe," is insufficient.[11] Under the British laws, a specification of the places to which the voyage might extend is implied that it was not to extend to any other place.[12] Inability to obtain freight will not absolve the owner from his contract to perform the voyage described in the articles.[13]

1 The Martha, Blatchf. & H. 156; The Baltic Merchant, Edw. Adm. 86, and see Rev. Stats. sec. 4511. Penalty for omitting to begin voyage—see Rev. Stats. sec. 4522.

2 Brown v. Jones, 2 Gall. 479; Anonymous, 1 Amer. L. J. 209; Magee v. The Moss, Gilp. 227. See Rev. Stats. sec. 4511.

3 Magee v. The Moss, 1 Gilp. 219; The Osceola, Olcott, 450.

4 The Christina, Deady, 49; The Horace E. Ball, 3 Ware, 236; Poland v. The Spartan.

5 Snow v. Wope, 2 Curt. 301; S. C. 1 Sprague, 300; 8 Law Rep. N. S. 590.

6 U. S. v. Smith. 1 Mason, 147.

7 Douglass v. Eyre, Gilp. 147.

8 The Sarah Jane, Blatchf. & H. 411; Brown v. Jones, 2 Gall. 477; U. S. v. Staly, 1 Wood. & M. 338; Ely v. Peck, 7 Conn. 239; The George Home, 1 Hagg. Adm. 370; The Eliza, Ibid. 182; The Countess of Harcourt, Ibid. 377; The Minerva, 6 C. Rob. 396; The Brutus, 2 Gall. 526.

9 The William Jarvis, 1 Sprague, 485.

10 The Gem, 1 Low. 182; Houston v. The New England Ins. Co. 5 Pick. 89; Deblois v. Ocean Ins. Co. 16 Pick. 303.

11 Thompson v. The Oakland, 4 Law Rep. 349; Gifford v. Kollock, 9 Law Rep. N. S. 21.

12 The Hermine, 3 Sawy. 80.

13 Thompson v. Oakland, 4 Law Rep. 349; 1 Paine, 180; 2 Gall. 164; 1 Hagg. Adm. 347; 3 Hagg. Adm. 202.

§ 146. Effect of deviation.—The maritime laws are peremptory, that the master shall perform the voyage stipulated in the shipping articles, and holds seamen discharged of their obligations if he deviates.[1] A change of the original voyage is a deviation.[2] Deviation from the voyage is a question of usage and the course of trade—a question of fact.[3] The exercise of the discretion of the master in going into or passing a port is not a deviation.[4] A stoppage at sea on meeting another vessel and taking on the crew rendered helpless by disease, is not a deviation authorizing seamen to leave the vessel.[5] If the visit to an intermediate port is left to the discretion of the master, it is not a deviation if he elect not to go there.[6] Articles describing the voyage to be from Philadelphia to South America, and any port or ports backwards or forwards, and back, is not violated from proceeding from South America to Europe,[7] but a voyage from Liverpool to Savannah and ports of the United States, West Indies, and British America, does not authorize a voyage to the Pacific Coast.[8] A change of voyage to operate as a discharge of the contract, must be willful.[9] Where the master acted *bona fide* and with the sole view of avoiding danger and to seek the safest course home, it was not a deviation.[10]

1 The Moslem, Olcott, 298.

2 Moran v. Baudin, 2 Pet. Adm. 415.

3 The Cadmus v. Matthews, 2 Paine, 229.

4 The Moslem, Olcott, 289.

5 The George Nicholaus, Newb. 449.

6 Wood v. The Nimrod, Gilp. 83.

7 Magee v. The Moss, Gilp. 219; Wood v. The Nimrod, Gilp. 83.

8 The Ada, 2 Ware (Dav.); The Disco, 2 Sawy. 476; The Minerva; The Cambridge, 2 Wheat. 243; The George Home, 1 Hagg. Adm. 370.

9 The Moslem, Olcott, 299; Wood v. The Nimrod, Gilp. 83.

10 Patrick v. Ludlow, 2 Johns. Cas. 10; S. C. 2 Amer. Dec. 130.

§ 147. Port of discharge.—Some cargo must be unladen to make the port of destination the port of discharge.[1] Discharge refers to the unloading of the goods.[2] The port to which a vessel may proceed to land her cargo, in consequence of the blockade of the port of destination, is considered the port of discharge.[3] A port where seamen are liable to be confined in jail if they leave the vessel is not a "port of discharge," and new articles signed by them at such port are deemed signed under duress.[4] If only one port in the United States is named and the vessel returns to that port and wholly discharges, it is a final port of discharge,[5] the port of discharge and the port of delivery being synonymous, in legal effect.[6]

1 U. S. v. Barker, 5 Mason, 404.

2 Kimball v. The Anna Kimball, 2 Cliff. 4; Sears v. Bags of Linseed, 1 Cliff. 68.

3 Cranmer v. Gernon, 2 Pet. Adm. 390.

4 Stratton v. Babbage, 3 Liv. Law Mag. 566; S. C. 8 Law Rep. N. S. 94.

5 The William Jarvis, 1 Sprague, 485.

6 Giles v. The Cynthia, 1 Pet. Adm. 207.

§ 148. Time and duration of voyage.—Where the time of continuance of voyage was agreed on, but accidentally omitted, the defect may be cured by written evidence,[1] and where the time is specified the seamen are not restricted to it, unless the voyage is made in the order specified.[2] Retaining seamen on board after the termination of the voyage, is a new contract on the original terms as to compensation;[2] so if after abandonment the voyage is continued by underwriters.[4] Where the duration is stated "probably twelve months" a seaman engages for more or less than that time, if the master, in good faith, endeavors to complete the voyage in that time.[5] Where the seaman ships for an indefinite period, he is at liberty to leave at the termination of any voyage, and the discharge of the cargo at a port of delivery.[6] A mariner who ships by "the run" takes the risk of accidents attendant upon the maritime enterprise, and in case of detention by stress of weather, he has no claim for additional compensation,[7] but the vessel is bound in case of detention to maintain him, while he remains attached to her.[8] Where a party claiming to be hired as a pilot represented that the engagement was terminable at his option, it affords a presumption that it was terminable at the option of the other party.[9]

1 The Antelope, How. 130.

2 The William Jarvis, 1 Sprague, 485.

3 Thompson v. Fausset, Pet. C. C. 182.

4 Hammond v. Essex, F. & M. Ins. Co. 4 Mason, 196.

5 The Hermine, 3 Sawy. 80.

6 Jansen v. The Heinrich, Crabbe, 226; The Crusader, 1 Ware, 437.

7 Miller v. Kelly, Abb. Adm. 564.

8 Miller v. Kelly, Abb. Adm. 564.

9 Truesdale v. Young, Abb. Adm. 391.

§ 149. Construction of contract.—The contract of each seaman is a distinct contract, although signed by several.[1] It is presumed to include the law maritime, except as varied or modified by express stipulations,[2] and the Court is bound to give it a construction most favorable to the seamen;[3] so in case of ambiguities.[4] Seamen are held strictly to their engagements, yet minor stipulations should be liberally and equitably construed;[5] and, although the law is liberal in their construction, still they are bound by their contract, where fraud is not practiced on them.[6] Immaterial erasures will be disregarded.[7] Where wages are specified by the month, the contract is deemed entire for the voyage;[8] but such a contract does not import compensation to be continued throughout the whole season,[9] but when hired for the season it is presumed for the whole season.[10] The season, as understood on the lakes, comprises eight months, commencing April the first and ending November the thirtieth.[11] Shipping by the run is a different contract in obligations and rights from the common contract of the seaman.[12] The contract of a seaman is conclusive as to the voyage and wages,[13] and term of service.[14] When services are volunteered they are presumed worth no more than cost of maintenance.[15] Shipping articles are to be construed as contemplating a voyage direct from the port of departure to the port of termination, unless otherwise stipulated or plainly made known.[16] Payment and receipt on discharge of cargo is sufficient evidence of termination of contract.[17]

1 Oliver v. Alexander, 6 Pet. 143.

2 The Atlantic, Abb. Adm. 476; The Crusader, 1 Ware, 437; Jameson v. The Regulus, 1 Pet. Adm. 212.

3 Goodrich v. The Domingo, 1 Sawy. 135; Wope v. Hemanway, 1 Sprague, 309; Jansen v. Heinrich, Crabbe, 226.

4 The Disco, 2 Sawy. 474; Jansen v. Heinrich, Crabbe, 226.

5 The Cadmus v. Matthews, 2 Paine, 229; Brice v. The Nancy, Bee, 430; Hernaman v. Bawden, 3 Burr. 1844.

6 Seamen's Wages, 13 Opin. Att.-Genl. 557; The Sarah Jane, Blatchf. & H. 410; Goodridge v. Peabody, 2 Danes Abr. 462; The Triton, Blatchf. & H. 284; The Warrington, Ibid. 337.

7 The Eagle, Olcott, 232.

8 Walton v. The Neptune, 1 Pet. Adm. 142; Sims v. Jackson, 1 Pet. Adm. 157. Commencement of wages—see Rev. Stats. sec. 4524.

9 Truesdale v. Young, Abb. Adm. 393; The Hudson, Olcott, 396.

10 The Balize, 1 Brown Adm. 424.

11 The Balize, 1 Brown Adm. 424.

12 Harden v. Gordon, 2 Mason, 547; Cutter v. Powell, 6 Term Rep. 320.

13 The Triton, Blatchf. & H. 284; The Warrington, Ibid. 334; The Sarah Jane, Ibid. 409.

14 The Isabella, 2 C. Rob. 241; The Warrington, Blatchf. & H. 337.

15 Roberts v. Noble, 1 Low. 57.

16 The Moslem, Olcott, 299; The George Home, 1 Hagg. Adm. 370.

17 Phillips v. The Thomas Scattergood, Gilp. 1; Mitchell v. Pratt, Taney, 453.

§ 150. Effect of special stipulations.—Seamen are treated as young heirs, wards, etc., by the courts, which will consider how far special agreements are reasonable,[1] assertions beyond the requisites of the statute being examined with scrutiny.[2] If anything unusual is contained in the shipping articles renouncing advantages, it must be proved that it was fully and fairly explained,[3] and was balanced by an adequate consideration,[4] otherwise it will not be binding.[5] A stipulation for a series of voyages may be terminated or varied by the mutual consent of the master and crew, and a new voyage substituted by parol.[6] A stipulation, by foreign seamen, that all disputes will be referred to the courts of their own country will be respected and enforced,[7] but not when the contract is put an end to.[8] Under a stipulation that differences should be submitted to arbitration, there were no differences to submit where wages were agreed on, demanded, and refused.[9] An express stipulation, that none of the crew shall demand wages until the return of the vessel to the port of outfit, is an agreement that wages legally due at a foreign port should be paid only at the port of outfit.[10] A stipulation that seamen will prosecute only in a court of common law is void, unless it is proved that the matter was fully explained to them and that their rights would not be prejudiced thereby,[11] but a stipulation that they will not sue till the vessel is unladen is binding if fairly made.[12]

1 The Sarah Jane, Blatchf. & H. 406; Harden v. Gordon, 2 Mason, 541.

2 The Sarah Jane, Blatchf. & H. 406; The George Home, 1 Hagg. Adm. 370.

3 Brown v. Lull, 2 Sum. 450, distinguishing Appleby v. Dods, 8 East, 300.

4 Freeman v. Baker, Blatchf. & H. 380; The George Home, 1 Hagg. Adm. 370; The Rajah, 1 Sprague, 200; The Highlander, Ibid. 510; Brown v. Lull, 2 Sum. 443; The Mary Paulina, 1 Sprague, 45; The Sarah

Jane, Blatchf. & H. 401; The Cypress, Ibid. 63; The Almatia, Deady, 473; Heard v. Rogers, 1 Sprague, 556; The Australia, 3 Ware, 240; The Rochambeau, Ibid. 304; Harden v. Gordon, 2 Mason, 541; The Quintero, 1 Low. 23; The Juliana, 1 Dods. 504.

5 The Almatia, Deady, 473; Matern v. Gibbs, 1 Sprague, 158; Mayshew v. Terry, 1 Sprague, 584; Harden v. Gordon, 2 Mason, 541; The David Pratt, 1 Ware, 500; The Betsy and Rhoda, 2 Ware, 117; The Sarah Jane, Blatchf. & H. 406.

6 Piehl v. Balchen, Olcott, 24.

7 Bucker v. Klorkgeter, Abb. Adm. 407; Sigard v. The Roberts, 3 Esp. 71; Simland v. Stephens, Ibid. 269.

8 The Elwin Kreplin, 4 Ben. 424; Wesberg v. The St. Oloff, 2 Pet. Adm. 428; Bucker v. Klorkgeter, 2 Pekid. 402.

9 The Sarah Jane, Blatchf. & H. 401.

10 Johnson v. The Lady Walterstorff, 1 Pet. Adm. 215.

11 The Sarah Jane, Blatchf. & H. 401.

12 Granon v. Hartsborne, Blatchf. & H. 454.

§ 151. Contracts, when invalid.—Any agreement injurious to the seaman is void,[1] or when any undue advantage is taken,[2] any stipulations contravening the language or the policy of the statute are of course void.[3] All agreements, if unjust, will be set aside or be disregarded,[4] as a contract to take less than the amount due, and the receipt of a seaman is no bar to a recovery of the balance;[5] it is only *prima facie* evidence of payment.[6] No attention should be paid to a release given from all claims and damages to procure the payment of wages.[7] A contract upon a discharge before the completion of the voyage, concerning wages already earned, will be set aside or disregarded.[8] Any contract made at sea changing the terms of the original contract is not binding on the seamen if it be contrary to justice.[9] An agreement not to demand wages is void,[10] so an agreement by a cook, on a fishing voyage, to renounce all wages, and in lieu thereof to accept the catch of one seaman, is unequal and unjust.[11] A contract not to receive wages unless the vessel safely returns to the home port, although freight should be earned on the outward voyage, will be set aside.[12] A stipulation that a return to duty after an absence shall not relieve the seaman from the forfeiture, is void.[13] Articles signed by a minor are void.[14]

1 The Cypress, Blatchf. & H. 87; Harden v. Gordon, 2 Mason, 541.

2 Somerville v. The Francisco, 1 Sawy. 393.

3 Harden v. Gordon, 2 Mason, 541; Cutter v. Powell, 6 T. R. 320; Appleby v. Dods, 8 East, 300; Jesse v. Roy, 4 Tyrw. 626; 1 Cromp. M. & R. 316.

4 The Ringleader, 6 Ben. 400.

5 Savins v. The Juno, 1 Woods, 309.

6 Whiteman v. The Neptune, 1 Pet. Adm. 180; The David Pratt, 1 Ware, 499; Harden v. Gordon, 2 Mason, 541; U. S. v. Williams, 1 Ware, 183.

7 Hanson v. Fowle, 1 Sawy. 545; Whitney v. Eager, Crabbe, 422.

8 The Hermine, 3 Sawy. 80.

9 The Christina, Deady, 49.

10 Giles v. The Cynthia, 1 Pet. Adm. 209; Edwards v. Child, 2 Vern. 727.

11 Somerville v. The Francisco, 1 Sawy. 390; Knight v. Parsons, 1 Sprague, 279; Mayshew v. Terry, 1 Sprague, 582.

12 The Rajah, 1 Sprague, 199; Johnson v. Sims, 1 Pet. Adm. 215; The Juliana, 2 Dods. 504; Buck v. Rawlinson, 1 Bro. P. C. 137.

13 Freeman v. Baker, Blatchf. & H. 372.

14 James v. LeRoy, Anth. N. P. 159.

§ 152. Rights of seamen.—In shipping articles, the law implies: first, that the ship is seaworthy; and second, that good and sufficient provisions shall be supplied.[1] If, before the voyage is begun, the seamen really believe, upon good reasons, that the vessel is unseaworthy, they may refuse to go to sea in her,[2] and may resist an attempt to compel them to do so without incurring a charge for a revolt;[3] and if they ask for a survey, they are not bound to go in her until the request is granted,[4] the master having no right to compel them;[5] if reasonable cause exists the owners cannot charge the seamen with the expense.[6] If, after commencing the voyage, the crew become apprehensive of great danger from unseaworthiness, it is not mutinous in them, in a body, to apply respectfully to the officers and urge that the ship be put back to port.[7] The liberty given to the crew by Revised Statutes to complain that they are in any manner detained contrary to their agreement, or that the vessel is unseaworthy, etc., applies only to such causes of complaint as are specified in the statute.[8] The right is to be exercised under the fair and reasonable discretion of the master as to time and mode of landing, and their refusal to do duty is justifiable only when the refusal is necessary to prevent a loss of their right,[9] and the master is liable in damages for his refusal to permit the exercise of their rights.[10] If they leave the vessel against orders, to go before the consul to complain of their treatment, it is not a desertion,[11] nor are they subject to forfeiture for coming ashore to legally demand their wages.[12] If seamen, from an honest mistake of their rights, peacefully refuse to labor, it will not justify their imprisonment.[13]

1 Dixon v. The Cyrus, 2 Pet. Adm. 407; U. S. v. Mitchell, 3 Wash. C. C. 95. And see Rev. Stats. sec. 4564.

2 U. S. v. Nye, 2 Curt. 225; The Moslem, Olcott, 289; Bucker v.

Klorkgeter, Abb. Adm. 402; U. S. v. Givings, 1 Sprague, 75; The Hibernia, Id. 78; U. S. v. Staly, 1 Wood. & M. 338; U. S. v. Ashton, 2 Sum. 13; Porter v. Andrews, 9 Johns. 350.

3 U. S. v. Givings, 1 Sprague, 75; U. S. v. Ashton, 2 Sum. 12.

4 U. S. v. Givings, 1 Sprague, 75. See Rev. Stats. secs. 4559, 4565.

5 The Hibernia, 1 Sprague, 78.

6 The William Harris, 1 Ware, 367.

7 The Moslem, Olcott, 289; U. S. v. Staly, 1 Wood & M. 338.

8 Jordan v. Williams, 1 Curt. 69; S. C. 4 Law Rep. N. S. 421; The Erwin Kreplin, 4 Ben. 420; The Union, 4 Blatchf. 90. And see Rev. Stats. secs. 4556–4561.

9 Jordan v. Williams, 1 Curt. 69; S. C. 4 Law Rep. N. S. 421.

10 Knowlton v. Boss. 1 Sprague, 163; S. C. 2 Law Rep. N. S. 13. And see Rev. Stats. sec. 4559.

11 Hart v. The Otis, Crabbe, 53; The Elwin Kreplin, 4 Ben. 420; The Union, 4 Blatchf. 90; Piehl v. Balchen, Olcott, 34; The Elizabeth, 1 Hagg. Adm. 182; The Minerva, Id. 347.

12 Babbel v. Gardner, Bee, 87; Pitkin v. Cardon, case not reported.

13 Wope v. Hemmenway, 1 Sprague, 300.

§ 153. Right of self-defense. — Exigencies might arise which would justify the officers and crew to restrain the master, but such measures should cease the moment the occasion for them ceases.[1] If, from the improper conduct of the master, the crew have good reason to believe that they will be subjected to cruel or oppressive treatment, or that great wrong is about to be inflicted on one of their number, they may take reasonable measures for his or their protection.[2] They are bound to obedience and respect of officers, and are not authorized to draw and brandish a knife or axe, but must wait for redress at home.[3] Where the crew interposed to prevent the punishment for gross misbehavior of one of their number, it was held an endeavor to commit a revolt.[4] They have not the right, in case of shipwreck and taking to the boats, to throw overboard some of the passengers to lighten the boat, but are bound to undergo necessary hazards to preserve the passengers.[5] Seamen may oppose the further infliction of punishment by escaping, and even by resisting, so far as to protect themselves from injury.[6]

1 U. S. v. Sharp, Pet. C. C. 118.

2 U. S. v. Borden, 1 Sprague, 374; S. C. 11 Law Rep. N. S. 100.

3 Fuller v. Colby, 3 Wood. & M. 1; S. C. 9 Law Rep. 397.

4 U. S. v. Morrison, 1 Sum. 448.

5 U. S. v. Holmes, 1 Wall. Jr. 1.

6 Fuller v. Colby, 3 Wood. & M. 9; U. S. v. Smith, 2 Wash. C. C. 78.

Somerville *v.* The Francisco, 1 Sawy. 393; Neilson *v.* The Laura, 2 Sawy. 244; The Ocean Spray, 4 Sawy. 105.

2 Reed *v.* Canfield, 1 Sum. 195.

3 Pierce *v.* Patton, Gilp. 435; Johnson *v.* Huckins, 1 Sprague, 67; Reed *v.* Canfield, 1 Sum. 195; The Ben Flint, 1 Abb. U. S. 131; S. C. 1 Biss. 566.

4 The Ben Flint, 1 Abb. U. S. 126.

5 The George, 1 Sum. 157.

6 The Ben Flint, 1 Abb. U. S. 131; S. C. 1 Biss. 566; S. C. 6 Amer. Law Rep. N. S. 707; Walton *v.* The Neptune, 1 Pet. Adm. 142; Reed *v.* Canfield, 1 Sum. 195; Johnson *v.* Huckins, 1 Sprague, 67; Pierce *v.* Patton, Gilp. 435; The Nimrod, 1 Ware, 9.

7 Knight *v.* Parsons, 1 Sprague, 279; S. C. Law Rep. N. S. 96.

8 The North America, 5 Ben. 486.

9 Nevitt *v.* Clarke, Olcott, 316; The Ben Flint, 1 Abb. U. S. 133; S. C. 1 Biss. 563.

10 Hart *v.* The Littlejohn, 1 Pet. Adm. 117; The Atlantic, Abb. Adm. 480; Harden *v.* Gordon, 2 Mason, 541; Reed *v.* Canfield, 1 Sum. 195.

11 The Atlantic, Abb. Adm. 451; The Ben Flint, 1 Abb. U. S. 132; S. C. 1 Biss. 567.

12 Richards *v.* The Juilliette, 2 N. Y. Leg. Obs. 23.

13 Tomlinson *v.* Hewett, 2 Sawy. 278.

14 Babcock *v.* Terry, 1 Low. 66.

15 Freeman *v.* Baker, Blatchf. & H. 383; Walton *v* The Neptune, 1 Pet. Adm. 142; Harden *v.* Gordon, 2 Mason, 555; Reed *v.* Canfield, 1 Sum. 197; The George, 1 Sum. 153; The Bradish Johnson, 1 Woods, 302; The Atlantic, Abb. Adm. 478; The Ben Flint, 1 Abb. U. S. 131; S. C. 1 Biss. 566; Ringgold *v.* Crocker, Abb. Adm. 347; The Nimrod, 1 Ware, 9; Croucher *v.* Oakman, 3 Allen, 185; Brown *v.* The D. S. Cage, 1 Woods, 405.

16 Nevitt *v.* Clarke, Olcott, 322; Reed *v.* Canfield, 1 Sum. 195.

17 Holmes *v.* Hutchinson, Gilp. 447; Walton *v.* The Neptune, 1 Pet. Adm. 142. See Rev. Stats. secs. 4569, 4570.

18 Harden *v.* Gordon, 2 Mason, 541.

19 The Cambridge, 4 Sawy. 252.

20 The Ben Flint, 1 Abb. U. S. 131; S. C. 1 Biss. 566; 6 Amer. L. R. N. S. 707; Walton *v.* The Neptune, 1 Pet. Adm. 142; Reed *v.* Canfield, 1 Sum. 195; Johnson *v.* Huckins, 1 Sprague, 67; Pierce *v.* Patton, Gilp. 435; The Nimrod, 1 Ware, 9.

21 Freeman *v.* Baker, Blatchf. & H. 372; The Atlantic, Abb. Adm. 451; The Ben Flint, 1 Abb. U. S. 132; S. C. 1 Biss. 566; The William Harris, 1 Ware, 373; Brunent *v.* Taber, 1 Sprague, 243; Ringgold *v.* Crocker, Abb. Adm. 344; Walton *v.* The Neptune, 1 Pet. Ad. 142; The Mentor, 4 Mason, 84; The Forest, 1 Ware, 420; The Phœbe, 1 Ware, 367. And see Rev. Stats. 4569, 4570.

§ 155. Rights of disabled seamen.—When a seaman is unable to do his duty by reason of sickness, he is entitled to his whole wages,[1] even if his sickness began before signing the articles, but after entering on the service;[2] but not if disabled by his own fault.[3] Full wages means the same wages he would have received had he lived and served out the whole voyage.[4] They are

entitled to be cured at the expense of the vessel.[5] In case of injury by fault or neglect of officers, the seaman is entitled to full wages till restored, and for expenses of keep and medical attendance.[6] If he received the hurt on entering the port of discharge, without any fault or negligence of the ship's officers, and took his discharge and full payment, the vessel is not liable.[7] A seaman left in a foreign hospital, on rejoining his vessel is entitled to the original rate of wages contracted for.[8] When disabled on whaling voyage and left abroad, he is to be paid the same proportion to his "lay" as the time he served was to the whole voyage.[9]

1 Sims *v.* Jackson, 1 Wash. C. C. 416; Chandler *v.* Greaves, 2 H. Black. 606; Cutter *v.* Powell, 6 Term Rep. 320; Walton *v.* The Neptune, 1 Pet. Adm. 152; Scott *v.* The Greenwich, 1 Pet. Adm. 155; The Exeter, 2 C. Rob. 261; Hart *v.* The Littlejohn, 115; Matterstrom *v.* Hazard, Bee, 461; Ex parte Giddings, 2 Gall. 57; Chandler *v.* Greaves, 2 H. Black. 606.

2 Neilson *v.* The Laura, 2 Sawy. 242, distinguishing Ex parte Geddings, 2 Gall. 55; Mahoon *v.* The Gloucester, Bee, 395; Chandler *v.* Greaves, 2 Blatchf. & H. 606; Nevitt *v.* Clarke, Olcott, 316; Hainey *v.* The Tristram Shandy, Bee, 414; Myers *v.* The Lizzie Hopkins, 1 Woods, 170; Sims *v.* Jackson, 1 Pet. Adm. 157; Wiggins *v.* Ingleton, 2 Ld. Ray. 1211.

3 Johnson *v.* Huckins, 1 Sprague 67.

4 Sims *v.* Jackson, 1 Wash. 414.

5 Brown *v.* The Brandish Johnson, 1 Woods, 302; Reed *v.* Canfield, 1 Sum. 195; Brown *v.* Overton, 1 Sprague, 462; Tomlinson *v.* Hewett, 2 Sawy. 284; Neilson *v.* The Laura, 2 Sawy. 246; The Ben Flint, 1 Abb. U. S. 133; 1 Biss. 568; Moseley *v.* Scott, 5 Amer. L. Reg. N. S. 599; Nevitt *v.* Clarke, Olcott, 316; The North America, 5 Ben. 489, distinguishing The George, 1 Sum. 151, 595.

6 Myers *v.* The Lizzie Hopkins, 1 Woods, 172; Brown *v.* Overton, 1 Biss. 567; S. C. 1 Sprague, 462; The Atlantic, Abb. Adm. 478; Reed *v.* Canfield, 1 Sum. 195; The Ben Flint, 1 Abb. U. S. 133; S. C. 1 Biss. 568; Moseley *v.* Scott, 5 Amer. Law Reg. N. S. 599; Nevitt *v.* Clarke, Olcott, 316; Croucher *v.* Oakman, 3 Allen, 185; Brown *v.* The Bradish Johnson, 1 Woods, 301; The Cortes, 6 Ben. 288; Walton *v.* The Neptune, 1 Pet. Adm. 142.

7 The Ben Flint, 1 Biss. 562.

8 Shakerly *v.* Pedrick, Crabbe, 63.

9 Brunent *v.* Taber, 1 Sprague, 243; S. C. 8 Law Rep. N. S. 685; Lovrein *v.* Thompson, 1 Sprague, 355.

§ 156. Right to damages.—Seamen are, in general, entitled to recover damages for an assault and battery by the officers; first, where violence is inflicted wantonly and without provocation; second, where there was provocation and cause, but the punishment was cruel and excessive; and third, usually when the punishment was inflicted with a deadly or dangerous weapon.[1] Where they are punished immoderately, after yielding submission, they may seek redress at the home port of the vessel;[2] the

punishment must be clearly excessive, or no damages will be awarded.[8] They are entitled to damages for the unlawful acts of the master in wounding, and then discharging them in a foreign port, while in the prosecution of the voyage.[4] They are entitled to damages in proportion to the injury received.[5] If the master fails to protect the seaman from ill-usage by the officers, he will be held responsible.[6] The vessel will be liable in damages for loss or injury to a mariner from carelessness, negligence, or the wilful misconduct of any officer,[7] or culpable negligence, in case of personal injury.[8] They are entitled to damages for defective supplies of medicine.[9]

1 Forbes *v.* Parsons, Crabbe, 283. And see Densmore *v.* Wilkes, 12 How. 390; The Philadelphia, Olcott, 220; Whitton *v.* The Commerce, 1 Pet. Adm. 160; Butler *v.* McLellan, 1 Ware, 229; Relf *v.* The Maria, Abb. Adm. 186; Fuller *v.* Colby, 3 Wood. & M. 10.

2 Fuller *v.* Colby, 3 Wood. & M. 10; Relf *v.* The Maria, 1 Pet. Adm. 186; Dinsman *v.* Wilkes, 12 How. 390; Sheridan *v.* Furbur, Blatchf. & H. 429; Brown *v.* Howard, 14 Johns. 122; Rice *v.* The Polly and Kitty, 2 Pet. Adm. 420; Thorne *v.* White, 1 Pet. Adm. 168; Sampson *v.* Smith, 15 Mass. 365.

3 Fuller *v.* Colby, 3 Wood. & M. 15; Butler *v.* McLellan, 1 Ware, 229; Thorne *v.* White, 1 Pet. Adm. 168.

4 The Ben Flint, 1 Abb. U. S. 133; S. C. 1 Biss. 568; Croucher *v.* Oakman, 3 Allen, 185; Brown *v.* The Independence, Crabbe, 54.

5 Butler *v.* McLellan, 1 Ware, 229; Relf *v.* The Maria, 1 Pet. Adm. 180; Thorne *v.* White, 1 Pet. Adm. 168; Jarvis *v.* Claiborne, Bee, 248; Sampson *v.* Smith, 15 Mass. 365.

6 Anderson *v.* Ross, 2 Sawy. 91.

7 Brown *v.* The D. S. Cage, 1 Woods, 401.

8 Reed *v.* Canfield, 1 Sum. 195; The Ben Flint, 1 Abb. U. S. 132; Brown *v.* Overton, 1 Sprague, 462.

9 Babcock *v.* Terry, 1 Low. 70; The George, 1 Sum. 157.

§ 157. Rights, duties, and liabilities of mate.—A mate, succeeding as master, does not lose his distinguishing character as mate.[1] A mate who takes command of a vessel on the death of the master is entitled to wages for the entire voyage at the contract price as mate.[2] He may sue in admiralty as mate, but at common law only for the extra compensation for acting as master.[3] He may be allowed out of the fund in court the value of his supplies beyond his own support taken from his private venture for the use of himself and crew.[4] In general, the mate must attend to taking in and delivering the cargo. If any special directions are given, he must obey them; if not, he must use common care and discretion, to the best of his judgment,[5] and may be responsible for loss by negligence in taking account of cargo,[6] but he is not responsible where the master, without notice to the mate,

voluntarily paid to the consignee an excess over the amount of the cargo stated in the bill of lading.[7] If goods are lost by his negligence, he cannot recover wages, but he will not be liable for a mere mistake.[8] A sailor made second mate, is entitled to second mate's wages from time of his appointment.[9] A second mate, rightfully displaced from heading a boat, is bound to perform other duty, and may be punished for disobedience,[10] but he may refuse obedience when no offense had been committed,[11] but he is bound to return to duty upon the order of the master.[12] Where the first mate, before leaving home port, became so intoxicated as to be disobedient, insolent, and negligent, the master is justified in discharging him.[13]

1 The George, 1 Sum. 157; Read v. Chapman, 2 Strange, 937; The Favourite, 2 C. Rob. 232.

2 The Fanny Gardner, 5 Biss. 209.

3 The Leonidas, Olcott, 14; Atkyns v. Burrows, 1 Pet. Adm. 244; The George, 1 Sum. 151.

4 The Rodney, Blatchf. & H. 226.

5 Wilson v. The Belvedere, 1 Pet. Adm. 258.

6 The Tuskar, 1 Sprague, 71.

7 Scharlock v. The Globe, Crabbe, 278.

8 Crammer v. The Fair American, 1 Pet. Adm. 242; Conner v. Levering, 2 Cranch C. C. 163.

9 The Blohm, 1 Ben. 228.

10 Morris v. Cornell, 1 Sprague, 62; S. C. 6 Law Rep. 304.

11 Foye v. Leekie, 1 Sprague, 210.

12 Gladding v. Constant, 1 Sprague, 73.

13 The Garnet, 3 Sawy. 350.

§ 158. Whaling and fishing voyages.—Seamen may contract for "lays" or shares on the venture;[1] such agreements are confined to privateering and fishing voyages.[2] The contract for shares or "lays" on a whaling voyage does not create a partnership, but a hiring, and the "lays" or shares are in the nature of wages; the crew are not jointly interested, nor are they liable to third persons for the debts of the vessel, or for outfits of the voyage;[3] but they are not wages so as to give the right to attach the vessel during the process of winding up the accounts of the venture;[4] the shares are to be ascertained on the final settlement of the voyage.[5] There is no established usage as to the mode in which they are to be calculated.[6] It is only on what escapes the perils of the sea that the lays can be reckoned.[7] So salvage paid by the master in good faith is a charge upon the oil, which seamen must share.[8] The claim of a seaman in the whale fishery is to a share of the proceeds of the voyage, when realized, according

ment for shares of every article "procured by the crew," the seamen cannot recover a share of freight.[8] A seaman on a whaling voyage, discharged at a foreign port at his request, is entitled to the *pro rata* part of his lay to the value at the home port.[4] Where seamen are ready and willing to make the fish it is equivalent to an actual performance, and they are entitled to be paid their shares.[5] Where the whaling voyage is lost abroad, and the cargo sent home to the owner, the seaman must resort to the owner for his share of the "catchings," in conformity to contract,[6] but the master is authorized to pay them their respective shares by delivering portions of the oil taken;[7] but where the vessel was wrecked and only a portion of the cargo saved, the seamen are entitled to a share only in the net proceeds.[8] Shipping articles for a fishing voyage do not determine conclusively who are owners, nor with whom the contract is made, but seamen have a remedy against all the owners, and may show these facts by other evidence than the papers of the vessel.[9] They may maintain a suit either in admiralty or at law for their share.[10]

1 Montgomery *v.* Tyson, 1 Low. 131; Hussey *v.* Fields, 1 Sprague, 394; Barrels of Oil, 1 Sprague, 475.

2 Macy *v.* De Wolf, 3 Wood. & M. 210; Barney *v.* Coffin, 3 Pick. 115.

3 The Sarah Jane, Blatchf. & H. 401.

4 Jenks *v.* Cox, 1 Holmes, 92.

5 Goodrich *v.* The Domingo, 1 Sawy. 182.

6 Jay *v.* Almy, 1 Wood. & M. 262.

7 Hussey *v.* Fields, 1 Sprague, 394; S. C. 10 Law Rep. N. S. 673.

8 Reed *v.* Hussey, Blatchf. & H. 525.

9 Walt *v.* Gibbs, 4 Pick. 297.

10 Duryee *v.* Elkins, Abb. Adm. 535; Baxter *v.* Rodman, 3 Pick. 435.

§ 160. Wages of seamen.—A stipulation for the payment at a certain rate will be carried out according to the intent of the parties.[1] Where the articles provided for payment in U. S. currency, or its equivalent in gold at the current rate of exchange, the consul at a foreign port should allow a deduction of the difference between greenbacks and gold, or silver, and the cost of exchange.[2] When payable in foreign currency, they are to be paid in U. S. gold coin, according to the commercial value of the foreign currency.[3]

1 Hathaway *v.* Jones, 2 Sprague, 56.

2 Seamen's Wages, 13 Opin. Atty. Gen. 557.

3 The Blohm, 1 Ben. 228. And see, Wages Payable in Gold, Rev. Stats. sec. 4548.

§ 161. Freight as the mother of wages.—Freight in the hands of the owners is a trust fund, to be accounted for to those whose industry produced it;[1] but the right of the seaman is not affected by any contract between the owners and the shippers, it extends to the full value of the freight earned.[2] There is no difference between passage money and freight, they are governed by the same rule of law.[3] By the old rule, freight is the mother of wages; if no freight is earned, no wages are due.[4] If freight is decreed for the whole voyage they are entitled to full wages; if for only a part of the voyage, they are entitled to *pro rata* wages.[5] The rule, that freight is the mother of wages, is abolished.[6] The maxim that freight is the mother of wages does not apply to a voyage commenced and intended to be made in ballast,[7] nor to a fishing or sealing voyage,[8] nor to where the voyage or the freight is lost by the negligence, fraud, or misconduct of the master or owner.[9] On an entire voyage, seamen cannot claim for part unless freight is earned.[10] Seamen are entitled to wages for the full period of their employment in which freight is or might be earned.[11] They are entitled to wages out of freight where the owners are also shippers.[12] Where freight is lost by inevitable accident, wages are lost,[13] as where the ship was abandoned at sea and set on fire.[14] The rule, that where freight is earned or damages recovered in lieu thereof, seamen are entitled to wages, has but one exception, namely: the case of recovery against the underwriters.[15] The abandonee is entitled to the cargo after abandonment, and is liable for the wages for the rest of the voyage.[16]

1 Sheppard *v.* Taylor, 5 Pet. 675; Poland *v.* The Spartan, 1 Ware, 139; Relf *v.* The Maria, 1 Pet. Adm. 186.

2 The Saratoga, 2 Gall. 164; 6 Amer. L. J. 12; Pitman *v.* Hooper, 3 Sum. 50; Griggs *v.* Austin, 3 Pick. 20.

3 Patten *v.* Park, Anth. N. P. 46.

4 Poland *v.* The Spartan, 1 Ware, 139; Henop *v.* Tucker, 2 Paine, 151; Giles *v.* The Cynthia, 1 Pet. Adm. 203; Walton *v.* The Neptune, 1 Pet. Adm. 144; McQuirk *v.* The Penelope, 2 Ibid. 276; Reed *v.* Hussey, Blatchf. & H. 525; The Niphon's Crew, 3 Law Rep. N. S. 266; The Two Catherines, 2 Mason, 332; Anonymous, 1 Ld. Ray. 639; Dunnett *v.* Tomhagen, 3 Johns. 154; Edwards *v.* Child, 2 Vern. 727; Brown *v.* Moates, Holt. Law of Sh. 276. This rule changed by statute—Rev. Stats. sec. 4525.

5 Brown *v.* Lull, 2 Sum. 443; The Saratoga, 2 Gall. 164; Willard *v.* Dorr, 3 Mason, 91, 161; Van Beuren *v.* Wilson, 9 Cow. 158; Icard *v.* Goold, 11 Johns. 279; Sheppard *v.* Taylor, 5 Pet. 675; Porter *v.* Andrews, 9 Ibid. 250; Dunnett *v.* Tomhagen, 3 Johns. 154. See Worth *v.* Mumford, 1 Hilt. 11; Beale *v.* Thompson, 4 East, 545; Spafford *v.* Dodge, 14 Mass. 66.

6 The Ocean Spray, 4 Sawy. 105. And see Rev. Stats. sec. 4525.

7 The Christina, Deady, 49.

8 The Ocean Spray, 4 Sawy. 105.

9 The Saratoga, 2 Gall. 164; 6 A. Law J. 12; Henop v. Tucker, 2 Paine, 151; Relf v. The Maria, 1 Pet. Adm. 186; Hindman v. Shaw, 2 Pet. Adm. 264; Hoyt v. Wildfire, 3 Johns. 518; Sullivan v. Morgan. 11 Ibid. 66. See Murray v. Kellogg, Ibid. 227; The Two Catherines, 2 Mason, 332; The Wenonah, 22 Int. Rev. Rec. 49.

10 Reed v. Hussey, Blatchf. & H. 539; Giles v. The Cynthia, 1 Pet. Adm. 203.

11 Pitman v. Hooper, 3 Sum. 266; S. C. 1 Law Rep. 226; The Elizabeth, 1 Pet. Adm. 128; Henop v. Tucker, 2 Paine, 151; Lewis v. The Elizabeth and Jane, 1 Ware, 46, questioning Post v. Robertson, 1 Johns. 24. And see Rev. Stats. sec. 4526.

12 The Niphon's Crew, 3 Law Rep. N. S. 266.

13 Schofield v. Potter, 2 Ware, 402; Poland v. Spartan, 1 Ware, 134.

14 Henop v. Tucker, 2 Paine, 161; The Saratoga, 2 Gall. 164; The John Taylor, Newb. 344; 3 Wood. & M. 444; Anonymous, 1 Ibid. 179; Wiggins v. Ingleton, 2 Ld. Ray. 1211; The Friends, 4 C. Rob. 116.

15 Ardrey v. The Karthans, Taney, 379.

16 Hammond v. The Essex F. & M. Ins. Co. 4 Mason, 196; Thompson v. Rowcroft, 4 East, 34.

§ 162. Wages on voyage broken up.— When the voyage is broken up, interrupted, or lost by any act of the master or owner, seamen are entitled to wages for the full voyage, or for damages in the nature of wages.[1] Where the voyage is broken up, or the seaman is discharged before the voyage begins, he is to have wages for the time he serves,[2] and a reasonable compensation for damages.[3] Where seamen were shipped for a voyage, were sent to their boarding-house for their meals, and while there others were shipped in their place, they were discharged without reason, and were entitled to damages for loss of voyage.[4] Where the voyage was broken up by seizure of the vessel for debt, one month's extra pay was allowed.[5] The discharge of the crew by a sale of the vessel on execution is a breaking up of the voyage, or a discharge by the master.[6] On a breach of the contract, seamen are entitled to wages until their return home.[7] If the voyage is broken up without cause, the seaman may recover wages for the whole voyage less his earnings meanwhile.[8] The disturbed condition of a country will not authorize breaking up the voyage, if the condition has not changed since time of sailing.[9] The maritime law distinguishes between cases where the service was not rendered in consequence of a peril of the sea, or by reason of some illegal act or misconduct of the master or owner interruptive of the voyage.[10] Where a vessel was run on a reef and lost, owing to a faulty chronometer, it could not be held that the voyage was broken up by the fault, fraud, or neglect of the owner.[11] Where the ship was condemned abroad as unfit

for service, the seamen are entitled to their expenses home, but not to extra wages.[12]

1 The Ocean Spray, 4 Sawy. 113; Hoyt v. Wildfire, 3 Johns. 520; The Maria, Blatchf. & H. 334; The Uncle Sam, 1 McAll. 77; Hart v. The Littlejohn, 1 Pet. Adm. 115.

2 Bray v. The Atalanta, Bee, 48.

3 Wells v. Ormond, 2 Show. 238; Bray v. The Atalanta, Bee, 48; Hoffman v. Yarrington, 1 Low. 171; Hindman v. Shaw, 2 Pa. 264; Nevitt v. Clarke, Olcott, 320; Woolf v. The Oder, 2 Pet. Adm. 261; The Elizabeth, 2 Dods. 403.

4 The Dolphin, 6 Ben. 402.

5 Woolf v. The Oder, 2 Pet. Adm. 261.

6 The Hudson, Olcott, 396.

7 Patten v. Park, Anth. N. P. 46; Emerson v. Howland, 1 Mason, 53; The Exeter, 2 C. Rob. 261; The Rovena, 1 Ware, 319; Harden v. Gordon, Mason, 547; The Beaver, 3 C. Rob. 92; Hoyt v. Wildfire, 3 Johns. 518.

8 The Maria, Blatchf. & H. 334; Saratoga, 2 Gall. 175; Hoyt v. Wildfire, 3 Johns. 518; Giles v. The Cynthia, 1 Pet. Ad. 203.

9 Campbell v. The Uncle Sam, 1 McAll. 77.

10 Honop v. Rucker, 2 Paine, 161; Sheppard v. Taylor, 5 Pet. 675.

11 Hill v. Murray, 6 Ben. 141.

12 Hoffman v. Yarrington, 1 Low. 170; The Dawn, 2 Ware, 121.

§ 163. Wages on discharge in foreign port.— Where seamen are discharged in a foreign port, they are entitled to three months' wages, whether their discharge took place at or before the termination of the agreement.[1] So, as to seamen in the whaling service;[2] wages are allowed as compensation though not earned.[3] When the vessel in a foreign port is prevented by higher power from completing the voyage, and the crew are discharged, they are entitled to a free passage home and two months extra wages.[4] A seaman leaving a vessel in a foreign port with the consent and assistance of the officers temporarily in command, but without the permission of the master, is discharged, and is entitled to three months' extra wages.[5] The payment of the three months' extra wages is confined to the case of a voluntary discharge.[6] If the seaman be discharged without his consent he is entitled to his expenses home, and the three months' extra wages does not exonerate from this;[7] by acceptance of a discharge, he loses his wages from the date of the discharge.[8] Discharge of seamen may be inferred from circumstances.[9] When the additional wages are not paid at the time of the discharge, they may be recovered by libel in the District Court.[10] The burden of proof is on the master to show the payment to the consul.[11] The master is directly liable for the two months' extra wages.[12] The seamen have a right to sue

for their extra wages, *in personam*, and wages earned by him in the interim are to be deducted from the compensation due for his discharge abroad,[13] and engaging in foreign service is a waiver of the benefit of the Act of Congress as to discharge in foreign port.[14] The Act of Congress confers on consuls the right to discharge seamen in a foreign port on the joint application of both the master and the seamen without requiring the payment of three months' wages, when deemed expedient,[15] and the certificate of the consul is conclusive of seaman's consent,[16] but his assent is not assumed from his being left in a hospital.[17]

1 Wells *v.* Meldrun, Blatchf. & H. 344; Hindman *v.* Shaw, 2 Pet. Ad. 264; Emerson *v.* Howland, 1 Mason, 49; The Herman, 1 Low. 515.

2 Bates *v.* Seabury, 1 Sprague, 433; S. C. 11 Law Rep. N. S. 668. And see Rev. Stats. sec. 4580.

3 Harden *v.* Gordon, 2 Mason, 547; The Beaver, 3 C. Rob. 92.

4 The Blohm, 1 Ben. 229.

5 The Caroline E. Kelly, 2 Abb. U. S. 160; S. C. 7 Phila. 570.

6 Pool *v.* Welsh, Gilp. 193.

7 Emerson *v.* Howland, 1 Mason, 53; Brooks *v.* Dorr, 2 Mass. 39; The Beaver, 3 C. Rob. 92; Lovrein *v.* Thompson, 1 Sprague, 355.

8 Lamb *v.* Briard, Abb. Adm. 370; Harden *v.* Gordon, 2 Mason, 541; Thorne *v.* White, 1 Pet. Adm. 168.

9 Granon *v.* Hartshorne, Blatchf. & H. 458; Dixon *v.* The Cyrus, 2 Pet. Adm. 407.

10 Orne *v.* Townsend, 4 Mason, 541; Pool *v.* Welsh, Gilp. 193; Wells *v.* Meldrun, Blatchf. & H. 342. As to the penalty for neglect to collect, see Rev. Stats. sec. 4581.

11 Orne *v.* Townsend, 4 Mason, 541.

12 Wells *v.* Meldrun, Blatchf. & H. 344; The Saratoga, 2 Gall. 164.

13 Dustin *v.* Murray, 5 Ben. 11; Wells *v.* Meldrun, Blatchf. & H. 342; The Dawn, 1 Ware, 489; The Saratoga, 2 Gall. 164; Nevitt *v.* Clarke, Olcott, 320; Sullivan *v.* Morgan, 11 Johns. 66; Hoyt *v.* Wildfire, 9 Johns. 138; Ward *v.* Ames, 11 Johns. 66; Ex parte Giddings, 2 Gall. 56; The Beaver, 3 C. Rob. 92.

14 Dustin *v.* Murray, 5 Ben. 13; Matthews *v.* Offley, 3 Sum. 115.

15 Lamb *v.* Briard, Abb. Adm. 370; The Atlantic, Abb. Adm. 451; Miner *v.* Harbeck, Abb. Adm. 546.

16 Lamb *v.* Driard, Abb. Adm. 371.

17 The Atlantic, Abb. Adm. 451.

§ 164. Discharge by sale of vessel abroad.—Where a vessel is sold in a foreign country, the master must pay into the hands of the consul three months' extra wages for the seamen,[1] one-third of the amount to be applied by the consul to the returning home of destitute seamen,[2] and the two months' extra wages to be paid by him to the seamen discharged.[3] The sale of the vessel abroad terminates the contract of the seamen,[4] and wages are due up

to the time of the sale;[5] they are entitled to wages up to the date of the actual sale, and not to the day of advertisement of the sale.[6] Where the vessel was sold in consequence of being wrecked, or stranded, or unfit for service, no additional wages are allowed,[7] as where the sale was rendered unavoidable by an imperious and overwhelming necessity,[8] but the two months' extra wages were allowed on a vessel condemned.[9] If the vessel can be repaired at a reasonable expense, and in a reasonable time, the owner is not exempted from the payment of two months' extra wages on a vessel sold in case of disaster.[10] The claim for extra compensation was denied in a case where the discharge was at the seaman's home.[11] If compulsion was employed to induce the seaman to remain on board and enter into a foreign service, it would be equivalent to a discharge.[12] American seamen on a foreign vessel must look to the laws of the country under whose flag they sail for remuneration and protection, where the ship is sold and the crew discharged in a foreign country.[13] If the owners would exempt themselves from the liability imposed by statute on sale of vessels abroad, they must establish necessity of it by affirmative proof.[14]

1 The Atlantic, Abb. Adm. 451; The Caroline E. Kelly, 2 Abb. U. S. 160; Wells *v.* Meldrun, Blatchf. & H. 342; Pool *v.* Welsh, Gilp. 193; Emerson *v.* Howland, 1 Mason, 45; Orne *v.* Townsend, 4 Mason, 541; Bates *v.* Seabury, 1 Sprague, 433; The Dawn, 2 Ware (Dav.) 121; Ogden *v.* Orr, 12 Johns. 143; Montell *v.* U. S. Taney, 24. And see Rev. Stats. secs. 4582-4584. Hospital dues—see Rev. Stats. secs. 4586, 4587.

2 The Dawn, 1 Ware, 489; The Saratoga, 2 Gall. 164.

3 Wells *v.* Meldrun, Blatchf. & H. 345; Van Beuren *v.* Wilson, 9 Cow. 158; Ogden *v.* Orr, 12 Johns. 143.

4 Nevitt *v.* Clarke, Olcott, 319; Hindman *v.* Shaw, 2 Pet. Adm. 264; Moran *v.* Baudin, 2 Pet. Adm. 415; Emerson *v.* Howland, 1 Mason, 52; The Cambridge, 2 Hagg. Adm. 243.

5 Emerson *v.* Howland, 1 Mason, 53; Nevitt *v.* Clarke, Olcott, 320.

6 Lang *v.* Holbrook, Crabbe, 179.

7 Hoffman *v.* Yarrington, 1 Low. 168; The Rupee, 1 Haz. U. S. Reg. 202; Anonymous, 1 Opin. Att. Gen. 148; Anonymous, 2 Ibid. 419; The Dawn, 2 Ware (Dav.) 121; S. C. 4 Law Rep. 106.

8 The Dawn, 2 Ware (Dav.) 121; S. C. 4 Law Rep. 106; Wells *v.* Meldrun, Blatchf. & H. 344; Oxnard *v.* Dean, 10 Mass. 143.

9 Wells *v.* Meldrun, Blatchf. & H. 346.

10 The Dawn, 1 Ware, 490; The Juniata, Gilp. 193.

11 Rogers *v.* Lewis, 1 Low. 297.

12 Dustin *v.* Murray, 5 Ben. 10.

13 Anonymous, 2 Opin. Att. Gen. 448.

14 The Dawn, 2 Ware (Dav.) 121; S. C. 4 Law Rep. 106.

§ 165. Wages on wrongful discharge.—If a seaman be wrongfully discharged,[1] or if he be compelled to desert by the cruelty of the master, he is entitled to full wages,[2] to successful termination of the voyage, or to his return home,[3] and a reasonable apprehension of cruelty has been held sufficient.[4] Wrongfully leaving a seaman on shore abroad is a violation of the shipping articles;[5] where his offense did not justify his discharge, the seaman is entitled to indemnity in the discretion of the court,[6] to his expenses of return, and to wages till able to return, as a measure of damages.[7] A mate wrongfully discharged abroad, and unable thereto to obtain a situation as mate, should be allowed his expenses and wages,[8] he is not bound to seek employment as a common sailor.[9] For a wrongful discharge abroad the measure of damages is not necessarily wages for the whole voyage, but indemnity for all lost or suffered may be awarded.[10]

1 Ward *v.* Ames, 9 Johns. 138; Wetmore *v.* Henshaw, 12 Johns. 324; The Minerva, 1 Hagg. Adm. 368; Ex parte Giddings, 2 Gall. 59; Hulle *v.* Heightman, 2 East, 145; S. C. 4 Esp. 75; The Jerusalem, 2 Gall. 198; Bucker *v.* Klorkgeter, 1 Abb. Adm. 407. The Beaver, 3 C. Rob. 92.

2 The America, Blatchf. & H. 185; Sherwood *v.* McIntosh, 1 Ware, 109; Emerson *v.* Howland, 1 Mason, 53; Hart *v.* The Littlejohn, 1 Pet. Adm. 115; Brown *v.* The Independence, Crabbe, 58; Limland *v.* Stephens, 3 Esp. 269; The Prince Edward *v.* Trevillick, 4 Ellis & B. 59; 28 Eng. L. & E. 205. And see Rev. Stats. sec. 4527.

3 Emerson *v.* Howland, 1 Mason, 53; Ward *v.* Ames, 9 Johns. 138.

4 The Prince Edward *v.* Trevillick, 4 Ellis & B. 59; 28 Eng. L. & E. 205.

5 Crapo *v.* Allen, 1 Sprague, 184; Hunt *v.* Colburn, Ibid. 215.

6 The Cornelia Amsden, 5 Ben. 315; Cloutman *v.* Tunison, 1 Sum. 384; Emerson *v.* Howland, 1 Mason, 45; Smith *v.* Treat, 2 Ware (Dav.) 266; Drysdale *v.* The Ranger, Bee, 148.

7 Rice *v.* The Polly and Kitty, 2 Pet. Adm. 420; Jay *v.* Almy, 1 Wood. & M. 269; The Nimrod, 1 Ware, 9; The Rovena, 1 Ware, 303; Emerson *v.* Howland, 1 Mass. 53.

8 Sheffield *v.* Page, 1 Sprague, 285; Gookin *v.* N. E. Mar. Ins. Co. 8 Law Rep. N. S. 99.

9 The Cornelia Amsden, 5 Ben. 321; Sheffield *v.* Page, 1 Sprague, 285.

10 Frye *v.* Dabney, 1 Sprague, 212; Frye *v.* Leckie, 1 Sprague, 210; Hunt *v.* Colburn, 1 Sprague, 215; Sheffield *v.* Page, 1 Sprague, 285.

§ 166. Wages in case of death.—In case of the death of a seaman during the voyage, wages are due up to the time of his decease.[1] Where the contract was entire, full wages are due;[2] but the claim was refused where the incompetency existed before the voyage commenced.[3]

1 Carey *v.* The Kitty, Bee, 255; Scott *v.* The Greenwich, 1 Pet. Adm. 155; Natterstrom *v.* The Hazard, Bee, 443, denying Sims *v.* Jackson, 1

Pet. Adm. 157. And see Cutter v. Powell, 6 Term Rep. 320; Beale v. Thompson, 4 East, 545. And see Rev. Stats. sec. 4542. As to effects of deceased—see Rev. Stats. secs. 4538-4541.

2 Walton v. The Neptune, 1 Pet. Adm. 143; Hart v. The Littlejohn, Ibid. 115; Scott v. The Greenwich, Ibid. 156, note; Chandler v. Greaves, 2 H. Black. 606.

3 Writer v. Richmond, 2 Pet. Adm. 263.

§ 167. Wages in case of wreck.—Seamen are entitled to wages in case of shipwreck if by their exertions remnants of the vessel are saved, although no freight be earned,[1] and notwithstanding the loss of the vessel, if a considerable part of the cargo be saved.[2] So long as their services are continued, their right continues in full force; and their lien attaches to the last plank of the vessel[3] and to the savings from the wreck,[4] and to the fund on sale of the wreck.[5] And where they are ready and willing to render service they are entitled to wages, although prevented from working by the owner;[6] but if they abandon the wreck, they forfeit their wages.[7] Their right depends on evidence of fidelity in laboring to save the vessel and cargo.[8] By the English statute, the seaman is entitled to wages up to the time of the loss, provided he could furnish a certificate of the master or chief surviving officer that he had exerted himself to the utmost to save the property.[9] In case of the loss of the vessel by shipwreck full wages are due where freight for the whole voyage was earned, and proportionate wages for a part of the voyage.[10] Where no cargo is delivered no freight is earned, and no wages are payable.[11] Where a salvor and not the ship-owner was the deliverer, and no freight was earned, no wages are due.[12] If the vessel carried one or more freights, and was afterwards lost, wages are due to the last port of delivery.[13] If lost after reaching the delivery port, wages are due to that port.[14] In case of loss of vessel by wreck, on the homeward voyage, seamen are entitled to wages up to the time the vessel arrived at the outward port.[15] The wages of the outward voyage is payable if freight is earned on that voyage, and of home voyage lost, if the vessel perish on that voyage.[16] Seamen cannot insure their wages.[17]

1 The Massasoit, 1 Sprague, 97; S. C. 7 Law Rep. 522; The Neptune, 1 Hagg. Adm. 227; Pitman v. Hooper, 3 Sum. 60. And see Adams v. The Sophia, Gilp. 77; Lewis v. The Elizabeth, 1 Ware, 41.

2 Weeks v. The Catharina Maria, 2 Pet. Adm. 424.

3 The Two Catharines, 2 Mason, 337; Pitman v. Hooper, 3 Sum. 67; Brown v. Lull, 2 Sum. 452; Sheppard v. Taylor, 5 Pet. 675; Collins v. The Fort Wayne, 1 Bond, 484; Bruce v. The America, 1 Newb. Adm. 195; Reif v. The Maria, 1 Pet. Adm. 186; Audrey v. Karthaus, Taney, 385; The Sydney Cove, 2 Dods. 11; The Mary Ann, 9 Jur. 94; The Lou-

183; The Two Catherines, 2 Mason, 339; Phillips v. McCall, 4 Wash. C. C. 144; Giles v. The Cynthia, 1 Pet. Adm. 203; Relf v. The Maria, 1 Pet. Adm. 186; Anonymous, 1 Sid. 179; Yates v. Hall, 1 Term Rep. 73; Dunnett v. Tombagen, 3 Johns. 154; Hooper v. Perley, 11 Mass. 545; Millett v. Stephens, not reported.

2 Reed v. Hussey, Blatchf. & H. 525; Montgomery v. Tyson, 1 Low. 131.

3 Sheppard v. Taylor, 5 Pet. 675; Weeks v. The Catharina Maria, 2 Pet. Adm. 426; Joy v. Allen, 2 Wood. & M. 303; The Dawn, 2 Ware, 121; Pitman v. Hooper, 3 Sum. 69; Anonymous, 1 T. Raym. 739; Cullen v. Mico, Keb. 831.

4 The Holder Borden, 1 Sprague, 149; The Massasoit, 1 Sprague, 97; The Neptune, 1 Hagg. Adm. 227; The Reliance, 2 W. Rob. 119.

5 The Warren, 12 N. Y. Leg. Obs. 257.

§ 169. Wages in case of capture.—A capture, unless followed by a condemnation, does not dissolve the contract, it is merely suspended, and on restoration it revives.[1] Seamen are entitled to wages though the vessel be captured by a public enemy.[2] They are bound to remain by the vessel till recovery is hopeless,[3] and where mariners refused to quit the ship, which was finally acquitted, they were entitled to full wages,[4] which reattach on restoration after capture,[5] but if the vessel be ransomed antecedent wages are gone.[6] Upon recapture and payment of salvage, the wages of seamen attach, but they must contribute their proportion to the salvage[7] if captured and condemned wages are due up to the date of condemnation,[8] but wages will be refused where the seamen served on an enemy's vessel.[9] In case of impressment or capture full wages are due, if freight be decreed for the whole voyage;[10] where mariners were carried off and the vessel sent in for adjudication, full wages were allowed to the time they might have rejoined her.[11]

1 Emerson v. Howland, 1 Mason, 45. And see Willard v. Dorr, 3 Mason, 91, 161; Langstrom v. The Hazard, 2 Pet. Adm. 384; Hitchen v. Wilson, 4 Amer. Law J. 275; The Saratoga, 2 Gall. 164; Pitman v. Hooper, 3 Sum. 306; Brooks v. Dorr, 2 Mass. 39; Beale v. Thompson, 4 East, 545; The Ocean Spray, 4 Sawy. 112.

2 Ardrey v. Karthaus, Taney, 379.

3 Copeland v. Security Ins. Co. Woolw. 284; Willard v. Dorr, 3 Mason, 91, 161.

4 Wesley v. Blays, 4 Amer. Law J. 275. And so, where their services were offered and refused—Girard v. Ware, Pet. C. C. 142.

5 Sheppard v. Taylor, 5 Pet. 703.

6 Phillips v. McCall, 4 Wash. C. C. 145; Wiggins v. Ingleton, 2 Ld. Ray. 1211; The Saratoga, 2 Gall. 168; Beale v. Thompson, 4 East, 548; The Friends, 4 C. Rob. 116; Yates v. Hall, 1 Term Rep. 73; The Velasco, Blatchf. Pr. 56; Pitman v. Hooper, 3 Sum. 61.

7 The Saratoga, 2 Gall. 168; Hart v. The Littlejohn, 1 Pet. Adm. 115; Beale v. Thompson, 4 East, 545; Howland v. The Lavinia, 1 Pet. Adm. 123; Wetmore v. Henshaw, 12 Johns. 324.

8 Vandever *v.* Tilghman, Crabbe, 66.

9 The Velasco, Blatchf. Pr. 54.

10 Pitman *v.* Hooper, 3 Sum. 298; Giles *v.* The Cynthia, 1 Pet. Adm. 203; Hart *v.* The Littlejohn, 1 Pet. Adm. 116; Clayton *v.* The Harmony, 1 Pet. Adm. 78, note; Hanson *v.* Rowell, 1 Sprague, 118, doubting The Rose, 1 Pet. Adm. 132; Brown *v.* Lull, 2 Sum. 443; The Saratoga, 2 Gall. 164.

11 Bordman *v.* The Elizabeth, 1 Pet. Adm. 128. But see Watson *v.* The Rose, Ibid. 143; The Friends, 4 C. Rob. 116.

§ 170. Extra wages for short allowance of provisions.—The navy ration is the rule by which the allowance to seamen should be determined.[1] Double wages are allowed to seamen by act of Congress, if the ship sails without the quantity of provisions specified in the act.[2] Where the articles specified in the act can be procured, no substitutes are allowed;[3] but when they cannot be procured, others of equal value may be substituted.[4] Extra wages are allowed when seamen are put on short allowance of bread, notwithstanding flour was substituted;[5] but flour cooked by the ship's cook may be substituted for ship's bread.[6] The act of Congress is in its nature penal, not to be extended beyond its terms, but additional wages may be awarded where seamen have sustained privations amounting to a breach of the shipping articles.[7] In case of accidents, the master may abridge the usual allowance, or substitute other provisions.[8] The two circumstances of deficiency in quantity or quality of provisions, and a short allowance must concur to entitle the crew to additional wages as provided by the act.[9] To subject the master or owners to the payment of extra wages for a short allowance, some order or command must have been given, or there must have been some gross negligence of the master.[10] If the crew were only insufficiently supplied the statute does not apply.[11] Putting the crew on short allowance without necessity is a breach of contract, and will entitle the crew to two months' additional wages.[12] It is sufficient to entitle to additional wages, that there is a deficiency in either of the classes of food mentioned in the act.[13] Every day's short allowance of each of the three articles mentioned in the act entitles the mariner to a day's wages, and two days' extra wages for each day that two of such articles are short.[14] Where there is short allowance of all of the articles of food mentioned in the statute, the seamen are entitled to triple wages.[15] Compensation for short allowance is recoverable as wages.[16] While mariners remain by their vessel and subsistence be not furnished, they

may recover the amount which they have properly paid therefor.[17]

1 Sundry Mariners *v.* The Washington, 1 Pet. Adm. 219; Gardner *v.* The New Jersey, 1 Pet. Adm. 224; The Mary, 1 Ware, 460; The Mary Pauline, 1 Sprague, 45.

2 Coleman *v.* The Harriet, Bee, 80; The Childe Harold, Olcott, 278; The Mary, 1 Ware, 454; The Elizabeth Frith, Blatchf. & H. 211; Sundry Mariners *v.* The Washington, 1 Pet. Adm. 219; Foster *v.* Sampson, 1 Sprague, 182. And see Rev. Stats. secs. 4565, 4568.

3 Sundry Mariners *v.* The Washington, 1 Pet. Adm. 221.

4 The Mary, 1 Ware, 459.

5 The Mary Pauline, 1 Sprague, 45; Sundry Mariners *v.* The Washington, 1 Pet. Adm. 219; Collins *v.* Wheeler, 1 Sprague, 191, distinguishing The Mary, 1 Ware, 454. And see Foster *v.* Sampson, 1 Sprague, 182; The Hermon, 1 Low. 515. And see Rev. Stats. sec. 4568.

6 The Hermon, 1 Low. 518, explaining Foster *v.* Sampson, 1 Sprague, 182.

7 The John L. Dimmick, 3 Ware, 196; Foster *v.* Sampson, 1 Sprague, 182; Collins *v.* Wheeler, 1 Sprague, 191, distinguishing The Mary, 1 Ware, 454.

8 Sundry Mariners *v.* The Washington, 1 Pet. Adm. 219.

9 Ferrara *v.* The Talent, 2 Paine, 291; The Elizabeth *v.* Rickers, 2 Paine, 291; The John L. Dimmick, 9 Amer. Law Reg. 224; The Childe Harold, Olcott, 275; The Mary, 1 Ware, 454.

10 The Elizabeth *v.* Rickers, 2 Paine, 291.

11 The Childe Harold, Olcott, 275.

12 The John L. Dimmick, 9 Amer. Law Reg. 224.

13 The Mary Pauline, 1 Sprague, 45, disapproving The Harriet, Bee, 80. And see Collins *v.* Wheeler, 1 Sprague, 190.

14 The Hermon, 1 Low. 519; Collins *v.* Wheeler, 1 Sprague, 188.

15 Collins *v.* Wheeler, 1 Sprague, 188.

16 Piehl *v.* Balchen, Olcott, 24.

17 The Gazelle, 1 Sprague, 378.

§ 171. Personal action for wages.—The owners of the vessel are personally liable for the wages of the seamen if the ship prove insufficient to pay them,[1] although their names may not be stated in the shipping articles.[2] Although by the statute no suit can be commenced against the vessel until ten days after right to wages has accrued, yet this does not affect the remedy *in personam*.[3] On the discharge of a seaman his wages become immediately payable.[4] As soon as the seaman's connection with the vessel is legally dissolved his right to demand wages ensues,[5] and the voluntary leaving of a vessel with the master's consent is a discharge.[6] So payment of the other seamen or permission to leave will be regarded as a general discharge.[7] A personal action lies against the master and owners immediately on a discharge of seamen, and costs may be awarded, although the action was brought before

the ten days expired; but they may be denied if the suit appears vexatious.[8] Seamen may sue as soon as the period of their service is completed, and before the delivery of the cargo,[9] the end of the voyage and discharge of the cargo being separate and distinct,[10] the voyage being ended when the vessel arrives and is moored at her port of destination.[11] The voyage is ended at the last place of destination, but not always at the last place of delivery.[12] Seamen do not forfeit their wages by leaving the vessel when the voyage is ended, and before the cargo is unladen.[13] They are not bound to stay by the vessel and assist in discharging the cargo, unless so provided in the shipping articles.[14] They may bring an action against the owners to recover their portion of the three months' extra wages, on their discharge abroad.[15] A pilot or engineer unlicensed cannot recover wages for services on a steam vessel engaged in carrying passengers on the waters of the United States.[16]

1 Carey *v.* The Kitty, Bee, 255. But see Harris *v.* Nugent, 3 Cranch C. C. 649.

2 Bronde *v.* Haven, Gilp. 592.

3 The William Jarvis, 1 Sprague, 490; Edward *v.* The Swan, 1 Pet. Adm. 165; Knagg *v.* Goldsmith, Gilp. 209; Thorne *v.* White, 1 Pet. Adm. 177; The Martha, Blatchf. & H. 159. And see Rev. Stats. sec. 4529.

4 The Cabot, Abb. Adm. 150; The Cypress, Blatchf. & H. 83; The William Jarvis, 1 Sprague, 485; Edward *v.* The Susan, 1 Pet. Adm. 165; The David Faust, 1 Ben. 183; The Cadmus, Blatchf. & H. 139; 2 Paine, 229; The Mary, 1 Ware, 458; Thompson *v.* The Philadelphia, 2 Pet. Adm. 210; Hastings *v.* The Happy Return, 1 Pet. Adm. 254; Collins *v.* Nickerson, 1 Sprague, 126; The Commerce, 1 Sprague, 34.

5 The Cypress, Blatchf. & H. 83; The Cadmus *v.* Matthews, 2 Paine, 229; S. C. Blatchf. & H. 139. And see Rev. Stats. sec. 4529.

6 The David Faust, 1 Ben. 183.

7 Granon *v.* Hartshorne, Blatchf. & H. 458; Edwards *v.* The Susan, Ibid. 165; Dixon *v.* The Cyrus, 2 Pet. Adm. 413.

8 The Susan, 3 Ware, 222; The Cadmus *v.* Matthews, 2 Paine, 229.

9 Freeman *v.* Baker, Blatchf. & H. 376; Collins *v.* Nickerson, 1 Sprague, 126; The William Jarvis, Ibid. 485; The Edward, Blatchf. & H. 286; The Warrington, Ibid. 335.

10 Hastings *v.* The Happy Return, 1 Pet. Adm. 254.

11 Sims *v.* Jackson, 1 Pet. Adm. 159; Chandler *v.* Greaves, 2 H. Black. 606; Cloutman *v.* Tunison, 1 Sum. 376; The Annie M. Small, 2 Sawy. 226; The Mary, 1 Ware, 456; The Martha, Blatchf. & H. 159; Knagg *v.* Goldsmith, Gilp. 210; Edwards *v.* The Susan, 1 Pet. Adm. 165; Granon *v.* Hartshorne, Blatchf. & H. 463; The Elizabeth Frith, Blatchf. & H. 202; Brown *v.* Jones, 2 Gall. 477; The Cadmus, Blatchf. & H. 139; Francis *v.* Bassett, 1 Sprague, 16; The Pearl, 5 C. Rob. 109; The Annie M. Small, 2 Sawy. 230; The Baltic Merchant, Edw. Adm. 86; The Passenger Cases, 7 How. 537; Levin *v.* Newnham, 4 Taunt. 722.

12 Granon *v.* Hartshorne, Blatchf. & H. 463; The Mary, 1 Ware, 456; Edward *v.* The Susan, 1 Pet. Adm. 165; Cloutman *v.* Tunison, 1 Sum. 373.

13 Francis v. Bassett, 1 Sprague, 16.

14 The Annie M. Small, 2 Sawy. 226; Cloutman v. Tunison, 1 Sum. 373; Knagg v. Goldsmith, Gilp. 207; The Rovena, 1 Ware, 307.

15 Tustin v. Murray, 5 Ben. 11; Wells v. Meldrun, Blatchf. & H. 644; Emerson v. Howland, 1 Mason, 49; Orne v. Townsend, 4 Mason, 549.

16 The Maria, Deady, 102; The Pioneer, Ibid. 58, 72. And see Rev. Stats. secs. 4441, 4442.

§ 172. Lien for wages.—A mariner is not bound to take any notice of the ownership of a vessel, nor to follow the estate of the owner into the probate court to collect his wages;[1] his claim creates a lien on the vessel, the freight and proceeds;[2] the cargo is hypothecated and subject to the claim;[3] it is an equitable privilege rather than a hypothecation.[4] The lien attaches to the freight money,[5] and follows it into the hands of assignees;[6] it follows the vessel and her proceeds into whosesoever hands they may come, where there are no laches;[7] it attaches to a vessel becoming the property of the government,[8] and to the proceeds awarded by government on the restoration of a vessel seized and condemned,[9] but not to a vessel seized and condemned as prize of war.[10] The lien attaches upon the parts saved from the wreck of the vessel,[11] and follows the vessel into the hands of salvors.[12] The lien exists while the vessel is getting ready, although she never leaves port,[13] and the voyage is not prosecuted.[14] It attaches even when the vessel is let by a charter party,[15] and is not affected by the contract between the owners and the charterers as to the freight,[16] nor between the master and owners.[17] It is a personal privilege, and is not assignable,[18] and if reduced to a common-law judgment it cannot be enforced.[19] The sale of the vessel by the master cuts off the lien.[20]

1 The Fanny Gardner, 5 Biss. 209.

2 The Thomas Jefferson, 10 Wheat. 428; Bronde v. Haven, Gilp. 598; The Ocean Spray, 4 Sawy. 105; Foster v. The Pilot No. 2, Newb. 215; S. C. 1 Amer. Law Reg. 403; Pitman v. Hooper, 3 Sum. 50; Brackett v. The Hercules, Gilp. 184; The Clayton, 5 Biss. 162; The Madonna de Idra, 1 Dods. 37; Brown v. Lull, 2 Sum. 443. Compare The Mary, 1 Paine, 180; Hainey v. The Tristram Shandy, Bee, 414. And see Rev. Stats. sec. 4535.

3 Skolfield v. Potter, 2 Ware, 402. But see Sheppard v. Taylor, 5 Pet. 675.

4 Packard v. The Louisa, 2 Wood. & M. 51; The Nestor, 1 Sum. 73.

5 The Sailor Prince, 1 Ben. 234; McDonald v. The Monadnock, 5 Amer. Law Ti. 87; Sheppard v. Taylor, 5 Pet. 675; Flaherty v. Doane, 1 Low. 152; Webb v. Pierce, 1 Curt. 104.

6 McDonald v. Freight Money, 15 Int. Rev. Rec. 33.

7 Sheppard v. Taylor, 5 Pet. 675; The Bolivar, Olcott, 477; Mut. Safety Ins. Co. v. The George, Olcott, 97; The Neptune, Olcott, 482; The Young Mechanic, 2 Curt. 410; The Julia Ann, 1 Sprague, 387; The

Havana, 1 Sprague, 402; The Batavia, 2 Dods. 500; Brown v. Lull, 2 Sum. 443; The Mary, 1 Paine, 180.

8 U. S. v. Wilder, 3 Saund. 308; S. C. 1 Law Rep. 189; The Copenhagen, 1 C. Rob. 243.

9 Sheppard v. Taylor, 5 Pet. 675.

10 U. S. v. The Sally Magee, 4 Int. Rev. Rec. 134.

11 Flaherty v. Doane, 1 Low. 148.

12 Smith v. Stewart, Crabbe, 218.

13 The Island City, 1 Low. 380.

14 Levering v. The Bank of Columbia, 1 Cranch C. C. 152.

15 Skolfield v. Potter, 2 Ware (Dav.) 342; S. C. 2 Law Rep. N. S. 115; 7 N. Y. Leg. Obs. 238; The Canton, 1 Sprague, 437; S. C. 11 Law Rep. N. S. 473.

16 The Erie, 3 Ware, 230; Pitman v. Hooper, 3 Sum. 66; Relf v. The Maria, 1 Pet. Adm. 187; Tasker v. Scott, 6 Taunt. 234; Andreas v. Moorhouse, 5 Taunt. 435.

17 The Galloway C. Morris, 2 Abb. U. S. 168; The Canton, 1 Sprague, 437; Skolfield v. Potter, 2 Ware (Dav.) 342.

18 Logan v. The Æolian, 1 Bond. 267; The Gate City, 5 Biss. 200. And see Rev. Stats. sec. 4536.

19 The Gate City, 5 Biss. 200; Flaherty v. Doane, 1 Low. 150; The Adelphi, case not reported.

20 The Amelie, 6 Wall. 18.

§ 173. Lien, in whose favor attaches.—All persons employed on a vessel to assist in the main purpose of the voyage are mariners, and included under the name of seamen,[1] and have a lien for their wages [2]—the clerk of a steamboat,[3] the cook on a foreign voyage,[4] the carpenter, if acting as seaman,[5] the pilot,[6] the engineer and mate of an enrolled tow-boat [7] have each a lien for their wages; and the lien of the engineer extends to the boilers, though claimed by the makers as still unpaid for.[8] Seamen engaged to make one or more coasting voyages have a lien on the vessel for wages while the ship is getting ready, though she never leaves the port.[9] So, seamen engaged in transporting goods upon tide waters, although within a harbor, have a lien for wages.[10] Persons shipped as sealers have a lien for their wages.[11] So, seamen in the whaling service are secured by a lien on the oil.[12] Third persons who, at the master's request, have advanced the seamen wages have the same right of lien,[13] but an owner has not.[14]

1 Black v. The Louisiana, 2 Pet. Adm. 268; Turner's Case, 1 Ware, 88; Sageman v. The Brandywine, Newb. 5; The Highlander, 1 Sprague, 568; Wolverton v. Lacey, 18 Law Rep. 672; Wheeler v. Thompson, 2 Strange, 707; The Jane and Matilda, 1 Hagg. Adm. 187; The Prince George, 3 Ibid. 376. See ANTE, sec. 79.

2 The Ocean Spray, 4 Sawy. 105.

3 The Sultana, 1 Brown Adm. 13.

4 The Charles F. Perry, 1 Low. 475.

5 Packard v. The Louisa, 2 Wood. & M. 53; The Lord Hobart, 2 Dods. 103.

6 Logan v. The Æolian, 1 Bond, 267. See PILOTAGE.

7 The May Queen, 1 Sprague, 586; S. C. 13 Law Rep. N. S. 658; Bayly v. Grant, 1 Salk. 33; Hook v. Moreton, 1 Ld. Ray. 397.

8 The May Queen, 1 Sprague, 586; S. C. 13 Law Rep. N. S. 658.

9 The Island City, 1 Low. 375; The Sarah Jane, 1 Low. 203.

10 The Bolivar, Olcott, 480; The Mary, 1 Sprague, 204; The Canton, 1 Sprague, 437; 11 Law Rep. N. S. 473. But see Packard v. The Louisa, 2 Wood. & M. 48; 9 Law Rep. 441.

11 The Ocean Spray, 4 Sawy. 105.

12 The Antelope, 1 Low. 130.

13 The W. F. Safford, 1 Lush. 69.

14 The Janet Wilson, 1 Swabey, 261.

§ 174. Lien, when does not attach.—Where the evidence showed that the cook was hired on the exclusive credit of the master, a lien for wages was denied.[1] Wages of attendants or servants engaged by the master in a foreign port are not a charge on the vessel,[2] so seamen hired by the master, who look only to him for remuneration, are not entitled to a lien on the vessel.[3] A physician employed by contract on board of the vessel has no lien for his fees,[4] so the ship's carpenter has no lien for moneys deposited with the master.[5] Laborers employed by a contractor have no lien on the vessel for their services.[6] A ship's keeper of a domestic vessel being repaired has no lien for his wages,[7] but otherwise as to a foreign vessel.[8] The service of a stevedore is in no sense maritime, and he has no lien therefor, while the ship is at the wharf in the possession of her owners.[9] After discharge and payment, seamen have no lien for further services done while the vessel is moored at the wharf.[10]

1 Scott v. Failes, 5 Ben. 82.

2 Sunday v. Gordon, Blatchf. & H. 669.

3 The Crusader, 1 Ware, 437; Packard v. The Louisa, 2 Wood. & M. 54.

4 Gardner v. The New Jersey, 1 Pet. Adm. 223.

5 Smith v. The Royal George, 1 Woods, 290.

6 The Whitaker, 1 Sprague, 229; S. C. 8 Law Rep. N. S. 496.

7 The Island City, 1 Low. 375; Levering v. The Bank of Columbia, 1 Cranch C. C. 269; McGinnis v. The Grand Turk, 4 West. Law Mon. 80; Shrewsbury v. The Two Friends, Bee, 437; Justin v. Ballam, 2 Ld. Raym. 805; 1 Salk. 34.

8 The Blohm, 1 Ben. 228.

9 McDermott v. The S. G. Owens, 1 Wall. Jr. 370; The Amstel, Blatchf. & H. 215; The Joseph Canard, Olcott, 120; Cox v. Murray, Abb. Adm. 349; Paul v. The Rex, 2 Woods, 229. But see McCarty v. The Senator, 5 Amer. Law Rev. 498. And see ANTE, § 79.

10 Phillips v. The Thomas Scattergood, Gilp. 7; Pritchard v. The Lady Horatia, Bee, 167; Packard v. The Louisa, 2 Wood. & M. 53.

§ 175. Priority of liens.—The lien for seaman's wages secures them a preference over all other claims.[1] It takes precedence of a mortgage lien,[2] and a bottomry bond,[3] and a hypothecation for supplies,[4] and to a claim of forfeiture to government where the parties were innocent of knowledge of illegality of the voyage.[5] The seaman's lien for wages is postponed to that of libellant in a case of collision, under the law of retaliation.[6]

1 Foster v. The Pilot No. 2, Newb. 215; S. C. 1 Amer. Law Reg. 403; Pitman v. Hooper, 3 Sum. 59; Brackett v. The Hercules, Gilp. 184; The Sailor Prince, 1 Ben. 236; The Galloway C. Morris, 2 Abb. U. S. 164; Lewis v. The Elizabeth and Jane, 1 Ware, 41; Relf v. The Maria, 1 Pet. Adm. 195; The Isabella, 1 Brown Adm. 103; Poland v. The Spartan, 1 Ware, 134; Kamerhavie v. Rosenkrants, 1 Hagg. Adm. 62; The Harrison, 2 Abb. U. S. 85. But compare The Mary, 1 Paine, 180; Hainey v. The Tristram Shandy, Bee, 414.

2 Furniss v. The Magoun, Olcott, 66; The Hersey, 3 Hagg. Adm. 404.

3 The Virgin, 8 Peters, 538; Pitman v. Hooper, 3 Sum. 59; The Rodney, Blatchf. & H. 230; The Favourite, 2 C. Rob. 232; Furniss v. The Magoun, Olcott, 66; Leland v. The Medora, 3 Wood. & M. 113.

4 The Hilarity, Blatchf. & H. 90.

5 St. Jago de Cuba, 9 Wheat. 409.

6 The Enterprise, 1 Low. 455; The Havana, 1 Sprague, 402; The Duna, 13 Irish Jur. 358.

§ 176. Waiver and divestment of lien.—The lien of a seaman is lost by laches, and suffering a vessel to be sold.[1] Whether it is lost by time depends on circumstances and the equity of the case.[2] It is not lost by delay in its enforcement where no third person has acquired a right to the vessel, and the owner is not injured thereby.[3] So a forbearance to libel the vessel at the port of discharge before the end of the voyage is not a waiver of their lien as against a subsequent *bona fide* purchaser.[4] The lien is not discharged by the sale of the vessel,[5] nor by a sale on execution against the owner,[6] nor pending a seizure;[7] it attaches to the vessel in whosesoever hands she may come with notice of the claim.[8] It may be enforced against the vessel in the hands of a *bona fide* purchaser, if the claim is pursued at the first opportunity after the debt has accrued,[9] if he follows up the vessel, though she may have made one or more voyages since his discharge.[10] But where the vessel had been sold under sentence of a foreign court of admiralty, at suit of others of the crew, and libellants had notice thereof, but did not apply for their wages, their lien is at an end.[11] They cease to be liens, when they were paid by the owners, and in no cases of a

delivery on bail are they a charge on the proceeds after condemnation.[12] A seaman accepting a note of the owners does not thereby waive his lien, unless it was his intention clearly expressed.[13] It is not discharged by taking a mere memorandum to show the owner the amount and proceeding before more than one voyage is known to have taken place.[14]

1 The Bolivar, Olcott, 478; The Eastern Star, 1 Ware, 185; The Galloway C. Morris, 2 Abb. U. S. 167; Blaine v. The Charles Carter, 4 Cranch, 328; Leland v. The Medora, 2 Wood. & M. 105; Greely v. Smith, 3 Wood. & M. 253; Burke v. The M. P. Rich, 1 Cliff. 271; The Nestor, 1 Sum. 73; 2 Story, 455. And see ANTE, § 84.

2 Packard v. The Louisa, 2 Wood. & M. 61; The Rebecca, 1 Ware, 180.

3 The Canton, 1 Sprague, 437; S. C. 11 Law Rep. N. S. 473; The Utility, Blatchf. & H. 222; Trump v. The Thomas, Bee, 86; The Galloway C. Morris, 2 Abb. U. S. 167.

4 The Mary, 1 Paine, 180.

5 Bronde v. Haven, Gilp. 598, distinguishing Aspinwall v. Bartlett, 8 Mass. 483. And see Packard v. The Louisa, 2 Wood. & M. 62; The Rebecca, 1 Ware, 188.

6 Taylor v. The Royal Saxon, 1 Wall. Jr. 311; Foster v. The Pilot No. 2, Newb. 215; S. C. 1 Amer. Law Reg. 403; 5 Pa. L. J. 231; Harris v. The Henrietta, Newb. 284; The Gazelle, 1 Sprague, 378; The Julia Ann, 1 Sprague, 382; S. C. 11 Law Rep. N. S. 21; McGinnis v. The Grand Turk, 4 West. Law Mon. 80. But see Gallatin v. The Pilot, 2 Wall. Jr. 592.

7 Anderson v. The Solon, Crabbe, 17.

8 Taylor v. The Royal Saxon, 1 Wall. Jr. 324; Brown v. Lull, 2 Sum. 443.

9 The Bolivar, Olcott, 480. And compare The Ferox, 1 Sprague, 180; S. C. 2 Law Rep. N. S. 183.

10 Freeman v. The Jane, Crabbe, 178.

11 Trump v. The Thomas, Bee, 86. And see ANTE, § 86.

12 Langdon v. Cheves, 2 Mason, 58.

13 The Betsy and Rhoda, 2 Ware, (Dav.) 112; S. C. 3 N. Y. Leg. Obs. 215; The Harriet, 1 Sprague, 33; Risher v. The Frolic, 1 Woods, 92; The Active, Olcott, 288; The Eclipse, 3 Biss. 103; Leland v. The Medora, 2 Wood. & M. 102; The Eastern Star, 1 Ware, 187; The Mentor, 1 Sum. 87, distinguishing The William Money, 2 Hagg. Adm. 136. And see The Ann C. Pratt, 1 Curt. 348.

14 Leland v. The Medora, 2 Wood. & M. 102; The Rebecca, 1 Ware, 188. See LIENS, *ante*, p. 48.

§ 177. Suit for wages.—A suit for wages cannot be maintained until the contract is performed or released.[1] Without an express stipulation a suit for wages on a foreign voyage cannot be instituted until the full completion of the voyage, and discharge of the cargo or ballast.[2] A suit brought before the expiration of the ten days allowed by act of Congress is premature,[3] unless there be a dispute between the master and mariners touching the wages,[4] but an unreasonable delay in unloading the vessel

may be equivalent to a discharge of the seamen.[5] Although wages are due when the voyage is ended, yet they are not payable till the discharge of the cargo.[6] Seamen may be bound by contract to unlade cargo.[7] Whether the duty to unlade cargo belongs to the seamen, depends on usage and the character of the hiring and voyage.[8] Seamen discharged without the payment of their wages are entitled to double pay for ten days after their discharge, although suit was brought before the expiration of the ten days.[9] The burden of proof is on the libellant to show that the vessel was actually unladen or had then been moored for the time allowed by law for unlading and in accordance with the articles.[10] Seamen on war vessels cannot sue in admiralty.[11]

1 The Swallow, Olcott, 4.

2 The Eagle, Olcott, 232; Ex parte Sprout, 1 Cranch C. C. 424; Schieffelin v. Haney, Anth. N. P. 76.

3 The David Faust, 1 Ben. 183.

4 The Eagle, Olcott, 232.

5 The Eagle, Olcott, 232; The Martha, Blatchf. & H. 151.

6 Hastings v. The Happy Return, 1 Pet. Adm. 255; Knagg v. Goldsmith, Gilp. 206.

7 Granon v. Hartshorne, Blatchf. & H. 463; The Martha, Ibid. 151; U. S. v. Barker, 5 Mason, 404; The Elizabeth Frith, Blatchf. & H. 202; The Baltic Merchant, Edw. Adm. 86.

8 Packard v. The Louisa, 2 Wood. & M. 55; The Mary, 1 Ware, 454.

9 The Columbia, 6 Ben. 398. And see Rev. Stats. sec. 4529.

10 Granon v. Hartshorne, Blatchf. & H. 454; Thompson v. The Philadelphia, 1 Pet. Adm. 210. Compare The Eagle, Olcott, 232.

11 The South Carolina, Bee, 422; Ellison v. The Bellona, Bee, 112; Packard v. The Louisa, 2 Wood. & M. 54; De Mortez v. The South Carolina, Hopk. Cas. 104.

§ 178. Deductions from wages.—Seamen may be subjected to deductions from their wages for neglect of their duty.[1] When seamen are wrongfully absent the expenses of substitutes may be deducted from their wages,[2] and if the vessel is thereby detained, a deduction to the extent of the loss actually sustained;[3] but no abatement will be made for occasional absences if not objected to, until the whole period of the service is expired.[4] Where the mate was absent during the unlading of the cargo, a deduction of two months' pay was made.[5] Advances voluntarily made to seamen abroad in foreign coin are to be estimated at their value at the place of payment.[6] Where the master paid certain debts contracted by the crew, he is entitled to have the amounts deducted from their wages.[7] Owners of whaling vessels claiming to deduct charges made by the master for articles furnished

to the crew, are bound to show that the charges were correct.[8] A loss incurred by reason of the crime of a seaman may be set off.[9] Wages earned after a forfeiture are not subject to the charge of advance wages stipulated in the articles, but only money advanced during the voyage, and hospital money should be apportioned on the whole voyage.[10]

1 The Martha, Blatchf. & H. 157; The Baltic Merchant, Edw. Adm. 86; Thorne v. White, 1 Pet. Adm. 175.

2 Snell v. The Independence, Gilp. 140.

3 Brown v. The Neptune, Gilp. 89.

4 The Harvest, Olcott, 271.

5 Cloutman v. Tunison, 1 Sum. 383; The Baltic Merchant, Edw. Adm. 86.

6 The Cabot, Abb. Adm. 150.

7 The Coldstream, 4 Sawy. 172.

8 The Hibernia, 1 Sprague, 79; Barney v. Coffin, 3 Pick. 115.

9 Thorne v. White, 1 Pet. Adm. 175.

10 The Mentor, 4 Mason, 102. And see Rev. Stats. secs. 4532, 4585, 4586.

§ 179. Deductions not allowed.—No deductions should be made from the wages of seamen on their discharge, before the completion of the voyage, with the master's consent and agreement to give full wages.[1] Where the seaman was unjustifiably imprisoned in a foreign port, a charge against him for a substitute is not allowed.[2] No deductions are allowed on account of insufficiency of the sum received by the owner to cover his loss in case of a condemnation,[3] or for expenses of relieving a vessel from capture,[4] nor for employing a watch on board,[5] nor for boarding seamen and transporting them home after a shipwreck,[6] nor for an allowance for decrease of risk upon the homeward voyage, on a declaration of peace while vessel was abroad.[7]

1 Pedro v. Allen, 1 Low. 435.

2 Johnson v. The Coriolanus, Crabbe, 239; Wilson v. The Mary, Gilp. 31; Magee v. The Moss, Gilp. 219.

3 Ardrey v. Karthaus, Taney, 379; Sheppard v. Taylor, 5 Pet. 675.

4 The Saratoga, 2 Gall. 164; Hart v. The Littlejohn, 1 Pet. Adm. 115; Howland v. The Lavinia, Ibid. 123; Pitman v. Hooper, 3 Sum. 50.

5 Chatfield v. The Wolga, 3 Law Rep. 387.

6 Macpherson v. Blytheswood, 1 Phila. 546; S. C. 12 Leg. Int. 58.

7 The Lethe, Bee, 423. But see Bruce v. The Nancy, Ibid. 429.

§ 180. Duties and obligations.—Obedience is required of seamen, not only on the high seas, but while the vessel is at anchor, and before clearance.[1] It should be prompt and uncomplaining.[2] They may refuse to obey unlawful orders, and may even restrain or imprison the officers attempting piracy or felony.[3] It is the duty of the seaman to obey the commands of the master, and to lay down weapons and submit to the discipline of the vessel, and for unjustifiable severity he is entitled to redress on return home.[4] They are bound to assist the master to constrain, imprison, and bring to justice disobedient, rebellious, and mutinous mariners.[5] If the master refuse a seaman a discharge at a foreign port, he is bound to submit.[6] A ship's cook may be called upon to perform service as a seaman, so far as he has experience and ability,[7] and if put to duty as a caulker, he is entitled to cook's wages.[8] A seaman deserting, who afterwards secretes himself on board, may be called upon to perform any service as seaman which may be within his ability.[9] In case of shipwreck, seamen are bound to remain by the wreck, and contribute their utmost exertions to rescue the property.[10] They are bound at all times to the preservation of the property intrusted to their care.[11] In case of capture, they are bound to remain by the vessel until the first adjudication.[12] The duties of seaman are often governed by usage at particular places.[13] They are bound to lade and unlade cargo at any port on the voyage;[14] and if they neglect to do so, they are liable in damages.[15] There is no law to relieve a seaman from working on Sunday.[16] The dismissal of the master and appointment of a new master does not discharge the crew from ordinary shipping articles.[17]

1 U. S. v. Staly, 1 Wood. & M. 339; U. S. v. Hamilton, 1 Mason, 443; U. S. v. Stevens, 4 Wash. C. C. 547; Fuller v. Colby, 3 Wood. & M. 12; Thorne v. White, 1 Pet. Adm. 175.

2 Fuller v. Colby, 3 Wood. & M. 14; The Mentor, 4 Mason, 84.

3 The Mary Ann, Abb. Adm. 274; U. S. v. Thompson, 1 Sum. 168.

4 Fuller v. Colby, 3 Wood. & M. 6; Thompson v. Basch, 4 Wash. C. C. 338.

5 Fuller v. Colby, 3 Wood. & M. 14; Relf v. The Maria, 1 Pet. Adm. 186; Thorne v. White, 1 Pet. Adm. 175.

6 Densman v. Wilkes, 12 How. 390.

7 Turner's Case, 1 Ware, 83; Sherwood v. McIntosh, 1 Ware, 109; Black v. The Louisiana, 2 Pet. Adm. 268; The Mentor, 4 Mason, 102; Allen v. Hallett, Abb. Adm. 573.

8 Sheridan v. Furbur, Blatchf. & H. 525; The Exchange, Id. 366.

9 Allen v. Hallett, Abb. Adm. 573.

10 The Dawn, 2 Ware, (Dav.) 121; S. C. 4 Law Rep. 106; Hooper v. Perley, 11 Mass. 545; Anonymous, 1 Sid. 179; The Two Catherines, 2 Mason, 322.

11 Sims v. Sundry Mariners, 2 Pet. Adm. 395; The Two Catherines, 2 Mason, 337.

12 Willard v. Dorr, 3 Mason, 165; The Saratoga, 2 Gall. 177; Brown v. Lull, 2 Sum. 443; Lemon v. Walker, 9 Mass. 404; Yates v. Hall, 1 Term Rep. 73; Elizabeth, 1 Pet. Adm. 128; Phillips v. McCall, 1 Wash. C. C. 145.

13 Packard v. The Louisa, 2 Wood. & M. 48; Relf v. The Maria, 1 Pet. Adm. 186; The George, 1 Sum. 151.

14 Hastings v. The Happy Return, 1 Pet. Adm. 254.

15 Cloutman v. Tunison, 1 Sum. 373; Knagg v. Goldsmith, Gilp. 207.

16 Ulary v. The Washington, Crabbe, 204; Johnson v. The Cyane, 1 Sawy. 151.

17 U. S. v. Nye, 2 Curt. 225; U. S. v. Hamilton, 1 Mason, 443; U. S. v. Haines, 5 Mason, 272; U. S. v. Barker, Id. 404.

§ 181. Forfeiture for disobedience and negligence.—A deliberate refusal to do duty on the part of a seaman is a high offense in maritime law.[1] The disobedience must be of a gross nature involving serious danger, mischief or malignancy, or it must be habitual,[2] depending on the circumstances of the case.[3] Every trivial act of disobedience will not work a forfeiture of wages.[4] A seaman is liable to forfeiture of wages for refusal to return to the vessel when requested by the master, although he was previously absent on leave,[5] or for refusal to join substituted vessel.[6] A refusal to do duty at a moment of high excitement from punishment received, if not followed by obstinate perseverance, is not a ground for forfeiture.[7] Seamen refusing to work on Sunday, unless allowed double wages, not a part of their contract, are guilty of disobedience and may be discharged, Sunday not being recognized by the maritime law.[8] A seaman restrained by confinement and threats is not chargeable with neglect of duty,[9] but he is chargeable for the loss of property occasioned by his negligence,[10] and the whole loss must fall on the guilty party.[11] Where seamen refused to proceed on a vessel, provided for the further transportation of the cargo, wages or additional allowance for the latter portion of the voyage will be refused,[12] and costs and charges for a substitute may be deducted.[13]

1 The Palledo, 3 Ware, 321.

2 The Mentor, 4 Mason, 84; The Almatia, Deady, 475.

3 Gladding v. Constant, 1 Sprague, 73.

4 The Almatia, Deady, 473.

5 The Cadmus v. Matthews, 2 Paine, 236; The Bulmer, 1 Hagg. Adm. 163.

6 Wells v. Meldrun, Blatchf. & H. 346; Hindman v. Shaw, 2 Pet. Adm. 264.

7 Orne v. Townsend, 4 Mason, 541.

8 The Richard Matt, 1 Biss. 449; Johnson v. The Cyane, 1 Sawy. 159.

9 Thorne v. White, 1 Pet. Adm. 168.

10 Brown v. The Neptune, Gilp. 89; Spurr v. Pearson, 1 Mason, 114; Wilson v. The Belvedere, 1 Pet. Adm. 253; Weston v. Minot, 3 Wood. & M. 442; Cook v. Jennings, 7 Term Rep. 381.

11 Knap v. The Eliza and Sarah, 1 Pet. Adm. 260.

12 Hindman v. Shaw, 2 Pet. Adm. 264.

13 Brower v. The Malden, Gilp. 294.

§ 182. Desertion, what constitutes.—Desertion, by the maritime law, is quitting the ship and service without leave and against the duty of the party, and with no intent to return.[1] Desertion must be during the voyage;[2] leaving the vessel after the voyage is ended is not desertion.[3] Willful absence in a foreign port, without intent to return, is deemed a final leaving of the ship;[4] the departure must be voluntary, and without cause;[5] without a reasonable excuse, founded on gross misconduct or harsh usage; absence without intent to return works a forfeiture of antecedent wages.[6] The rule applies to seamen in inland and tide waters.[7] Where an engineer left his post of duty, and did not return to it, it was desertion.[8] The abandonment of a captured vessel is desertion.[9] To constitute desertion sufficient to cause a forfeiture of wages, there must be an intent to desert. Going on shore without leave, with intent to return, is not desertion.[10] In a case of collision a seaman jumped from his vessel to the other for safety, and afterwards endeavored to join his own vessel, but could not: it was held not desertion.[11] When seamen, with consent and assistance of the mate, left the vessel, it was not desertion.[12] If seamen, against orders, leave the vessel to go before the consul to complain of their treatment, it is not desertion.[13] If seamen are absent without any fault on their own part, they are entitled to full wages.[14]

1 The Balize, 1 Brown Adm. 424; The Magnet, Ibid. 547; The Ericson, 3 Sawy. 559; Pitman v. Hooper, 3 Sum. 50; The Merrimac, 1 Ben. 402; The Hermine, 3 Sawy. 80; The Swallow, Olcott, 4; The Philadelphia, Ibid. 216; The Cadman v. Matthews, 2 Paine, 229; Coffin v. Jenkins, 3 Story, 108; Cloutman v. Tunison, 1 Sum. 373; Cotel v. Hilliard, 4 Mass. 664; Anonymous, 3 Salk. 23; The Rovena, 1 Ware, 316; Whiteman v. The Neptune, 1 Pet. Adm. 180; Burton v. Salter, 11 Law Rep. N. S. 148; The Almatia, Deady, 475; The John Martin, 2 Abb. U. S. 172.

2 Cloutman v. Tunison, 1 Sawy. 373; The Elizabeth Frith, Blatchf. & H. 195; Brown v. Jones, 2 Gall. 77; The Martha, Blatchf. & H. 151; Travers v. Bassett, 1 Sprague, 16.

3 The Martha, Blatchf. & H. 151; Granon v. Hartshorne, Ibid. 454.

4 The Philadelphia, Olcott, 219; Cloutman *v.* Tunison, 1 Sum. 373; The Bulmer, 1 Hagg. Adm. 163.

5 Magee *v.* The Mpss, Gilp. 219; Limland *v.* Stevens, 3 Esp. 269.

6 The Merrimac, 1 Ben. 490; The Maria, Blatchf. & H. 333; The Bulmer, 1 Hagg. Adm. 163; The Belize, 1 Brown Adm. 424; The John Martin, 2 Abb. U. S. 183; The Magnet, 1 Brown Adm. 547; Coffin *v.* Shaw, 3 Ware, 83.

7 The Swallow, Olcott, 4.

8 The John Martin, 2 Abb. U. S. 172.

9 Boardman *v.* The Elizabeth, 1 Pet. Adm. 128.

10 The Catawanteak, 2 Ben. 189; 1 Bank Reg. 83.

11 Hanson *v.* Rowell, 1 Sprague, 117; The Elizabeth and Jane, 1 Ware, 35.

12 The Caroline E. Kelly, 2 Abb. U. S. 160; S. C. *sub nom* Doherty *v.* The Caroline E. Kelly, 7 Phila. 570.

13 Hart *v.* The Otis, Crabbe, 52; Freeman *v.* Baker, Blatchf. & H. 372. See The Catherine, Bee, 87.

14 Sundry Seamen *v.* The Fair American, Bee, 134; Veacock *v.* McCall, Gilp. 329; Nevitt *v.* Clarke, Olcott, 316. But compare Watson *v.* The Rose, 1 Pet. Adm. 132.

§ 183. Entry in log-book as evidence.—The entry in the log-book is only *prima facie* evidence of the facts therein contained.[1] Parol evidence is admissible as to facts ordinarily recorded, without showing that the book is lost or missing.[2] It may be repelled by proof of the falsity of the entry, or its being a mistake.[3] It is not evidence of any fact but that which it is made to establish by act of Congress.[4] If an entry is imperfect, the defect can be supplied by other evidence.[5] It is evidence of the time the seaman came on board.[6] It is not sufficient to prove the handwriting of the mate as to some of the entries in it.[7]

1 Knagg *v.* Goldsmith, Gilp. 216; Thompson *v.* The Philadelphia, 1 Pet. Adm. 210; Jones *v.* The Phœnix, Id. 201. And see Rev. Stats. secs. 4290–4292, 4597.

2 U. S. *v.* Gilbert, 2 Sum. 19.

3 Orne *v.* Townsend, 4 Mason, 541; Jones *v.* The Phœnix, 1 Pet. Adm. 201; Douglass *v.* Eyre, Gilp. 147; The Hercules, 1 Sprague, 534.

4 U. S. *v.* Gilbert, 2 Sum. 19; Jones *v.* The Phœnix, 1 Pet. Adm. 201; Malone *v.* The Mary, Id. 139.

5 Herron *v.* The Peggy, Bee, 57.

6 Malone *v.* The Mary, 1 Pet. Adm. 139.

7 U. S. *v.* Mitchell, 2 Wash. C. C. 478; 3 Wash. C. C. 95.

§ 184. When seamen entitled to leave service. When the vessel is unseaworthy, the seamen are not bound by their contract, and may refuse to continue the voyage.[1] So, feeding them on unwholesome or spoiled provisions will justify the crew in leaving the vessel.[2] When seamen shipped without signing articles, they may leave the service at any time;[3] so, if the ship's articles do

not sufficiently describe the voyage, they may leave at any port where a substitute could be procured, and no especial inconvenience be created,[4] but not at an intermediate port not named in the articles.[5] Leaving in a place where the master could easily obtain a substitute is not desertion.[6] Where they stipulate for an indefinite period, they may leave after the termination of any particular voyage.[7] They have a right to leave the vessel at any suitable time and place for any material deviation in the voyage,[8] but the deviation must be willfully made.[9] They may leave the vessel on the ground that she is chartered for an illegal voyage.[10] Their right to leave the vessel will not justify them in taking possession of her.[11] When justified in leaving the vessel, the voyage, as to the seaman's contract, is ended,[12] and his rights are the same as if he had been technically discharged.[13] When, on the voyage, the steward is disrated and put before the mast, it amounts to a rescission of the contract, and he may claim his discharge.[14]

1 The Moslem, Olcott, 297; Porter *v.* Andrews, 9 Johns. 350; U. S. *v.* Ashton, 2 Sum. 13.

2 The Childe Harold, Olcott, 278; The Castilla, 1 Hagg. Adm. 59; Hastings *v.* The Happy Return, 2 Pet. Adm. 255; The Eliza, 1 Hagg. Adm. 186; Ulary *v.* The Washington, Crabbe, 204.

3 Graham *v.* The Exporter, 21 Int. Rev. Rec. 110; The Fremont, 10 Amer. Law Reg. N. S. 340; S. C. 13 Int. Rev. Rec. 149.

4 The Gem, 1 Low. 182; The Crusader, 1 Ware, 437; Wope *v.* Hemenway, 1 Sprague, 300; Snow *v.* Wope, 2 Curt. 301, denying Magee *v.* Moss, Gilp. 219; Pfehl *v.* Balchen, Olcott, 34; The Eliza, 1 Hagg. Adm. 182; The Minerva, Ibid. 347.

5 Wood *v.* The Nimrod, Gilp. 83.

6 The Crusader, 1 Ware, 437.

7 Jansen *v.* The Heinrich, Crabbe, 234; Magee *v.* The Moss, Gilp. 219.

8 The Mary Ann, Abb. Adm. 76; The Crusader, 1 Ware, 437.

9 The Moslem, Olcott, 299; The Nimrod, 1 Ware, 9; The Becherdass Amberdass, 1 Low. 571; Bucker *v.* Klorkgeter, Abb. Adm. 402; The Mary Ann, Abb. Adm. 278; U. S. *v.* Matthews, 2 Sum. 470.

10 The Mary Ann, Abb. Adm. 270.

11 The Mary Ann, Abb. Adm. 270.

12 Bush *v.* The Alonzo, 2 Cliff. 550; The Exeter, 2 C. Rob. 261.

13 Bush *v.* The Alonzo, 2 Cliff. 550; The Rovena, 1 Ware, 309; Emerson *v.* Howland, 1 Mason, 45; The Exeter, 2 C. Rob. 261; The Cadmus, Blatchf. & H. 139; Graham *v.* The Exporter, 21 Int. Rev. Rec. 110; The Childe Harold, Olcott, 278; The Castilla, 1 Hagg. Adm. 59; The Eliza, Id. 182.

14 The Hotspur, 3 Sawy. 194.

§ 185. Forced abandonment of service.—Repeated acts of cruelty by master or mate, if accompanied by threats of death or enormous bodily harm, will justify a seaman in leaving the service before the voyage is ended.[1] To justify his departure, it must appear that he could not remain without extra danger to his personal safety.[2] Where the seaman was obliged to leave from the cruelty of the master, wages were allowed to the time of leaving;[3] they are entitled to full wages.[4] Seamen so chastised for insolence as to be obliged to be left in a foreign port are entitled to wages to the time the vessel arrived at the last port of delivery.[5]

1 Bush v. The Alonzo, 2 Cliff. 550; Sherwood v. McIntosh, 1 Ware, 109; Steele v. Thacher, 1 Ware, 91; Magee v. The Moss, Gilp. 229; Rice v. The Polly and Kitty, 2 Pet. Adm. 420.

2 The America, Blatchf. & H. 186; Rice v. The Polly and Kitty, 2 Pet. Adm. 420; Ward v. Ames, 9 Johns. 138; Limland v. Stephens, 3 Esp. 269; Relf v. The Maria, 1 Pet. Adm. 186; Magee v. The Moss, Gilp. 219; Coffin v. Jenkins, 3 Story, 138.

3 Rice v. The Polly and Kitty, 2 Pet. Adm. 420; Welberg v. The St. Oloff, 2 Pet. Adm. 428.

4 Sherwood v. McIntosh, 1 Ware, 120; Relf v. The Maria, 1 Pet. Adm. 186; Ward v. Ames, 9 Johns. 138; 11 Id. 66.

5 Brown v. The Independence, Crabbe, 54.

§ 186. Remedies in case of desertion.—Where a seaman, having signed articles, absents himself from the vessel, the master may enter his desertion in the log-book, which terminates the contract, or he may cause him to be imprisoned until the time of sailing, in which case no forfeiture ensues.[1] A rigid compliance with the requisites of the act is required of masters.[2] Forfeiture ensues when the desertion is proved precisely according to requisites of the statute;[3] a due entry in the log-book is indispensable[4] in case of absence for more than forty-eight hours without leave.[5] The entry is to be made on the day of desertion,[6] and must state "without leave."[7] The remedy under the statute is waived by a neglect to make the proper entry in the log-book.[8] If a statutory desertion is relied on, the statutory proof must be made; otherwise not.[9] The forfeitures imposed on seamen are mulcts for misconduct inflicted in accordance with ancient rules of the maritime law.[10] The statutes as to desertion must be construed together;[11] in cases not within their provisions they do not repeal the general maritime law.[12]

1 Brower v. The Malden, Gilp. 294. And see Rev. Stats. secs. 4598, 4599.

2 The Martha, Blatchf. & H. 155; Herron v. The Peggy, Bee, 57; The Phœbe v. Dignum, 1 Wash. C. C. 43; The Quintero, 1 Low. 41.

3 The Union, Blatchf. & H. 555; The Elizabeth Frith, Blatchf. & H. 195; The Martha, Blatchf. & H. 195; Jones v. The Phœnix, 1 Pet. Adm. 201; Gifford v. Kollock, 3 Ware, 51; The Cadmus, Blatchf. & H. 139; The Jasper, 3 Ware, 296.

4 The Catawanteak, 2 Ben. 189; S. C. 1 Bank Reg. 83; The Douglass v. Eyre, Gilp. 152; Knagg v. Goldsmith, Gilp. 214; The Sarah Jane, Blatchf. & H. 411; Betsey v. Duncan, 2 Wash. C. C. 272; Brower v. The Malden, Gilp. 294; Magee v. The Moss, Gilp. 219; The Cadmus, Blatchf. & H. 139; 2 Paine, 229; The Hercules, 1 Sprague, 534; Cloutman v. Tunison, 1 Sum. 373; Wood v. The Nimrod, Gilp. 83; The Osceola, Olcott, 461; Malone v. Bell, 1 Pet. Adm. 139. And see Rev. Stats. sec. 4597.

5 The Quintero, 1 Low. 41; The Rovena, 1 Ware, 309; Coffin v. Jenkins, 3 Story, 113; Cloutman v. Tunison, 1 Sum. 373; Knagg v. Goldsmith, Gilp. 216; The Phœbe v. Dignum, 1 Wash. C. C. 48.

6 The Sarah Jane, Blatchf. & H. 411; The Phœbe v. Dignum, 1 Wash. C. C. 48; Douglass v. Eyre, Gilp. 152; Cloutman v. Tunison, 1 Sum. 373; The Cadmus v. Matthews, 2 Paine, 229; The Catawanteak, 2 Ben. 189.

7 The Rovena, 1 Ware, 314; Cloutman v. Tunison, 1 Sum. 373; Ulany v. The Washington, Crabbe, 204; The Catawanteak, 2 Ben. 189.

8 Knagg v. Goldsmith, Gilp. 217; Herron v. The Peggy, Bee, 57.

9 The John Martin, 2 Abb. U. S. 172, dissenting from The Cadmus, Blatchf. & H. 139; The Martha, Ibid. 151; The Elizabeth Frith, Ibid. 195; The Union, Ibid. 545; Wood v. The Nimrod, Gilp. 83; Snell v. The Independence, Ibid. 140; Knagg v. Goldsmith, Ibid. 207; The Osceola, Olcott, 461; The Bulmer, 1 Hagg. Adm. 163. And see The Crusader, 1 Ware, 437; The Sarah Jane, Blatchf. & H. 411; Malone v. Bell, 1 Pet. Adm. 139; Burton v. Salter, 1 Law Rep. N. S. 148; Gifford v. Kollock, 3 Ware, 51; The Union v. Jansen, 2 Paine, 285.

10 Banta v. McNeil, 5 Ben. 78; The Elizabeth Frith, Blatchf. & H. 195.

11 The John Martin, 2 Abb. U. S. 180, distinguishing Milligan v. The B. F. Bruce, Newb. 539.

12 The John Martin, 2 Abb. U. S. 172; Cloutman v. Tunison, 1 Sum. 373; Coffin v. Jenkins, 3 Story, 188; The Cadmus v. Matthews, 2 Paine, 229; The Union v. Jansen, Ibid. 277; Barton v. Salter, 21 Law Rep. 146; The Rovena, 1 Ware, 309; Piehl v. Balchen, Olcott, 33; The Swallow, Ibid. 10; The Crusader, 1 Ware, 437; Jameson v. The Regulus, 1 Pet. Adm. 212.

§ 187. Forfeiture for embezzlement.—A mariner forfeits his wages by an embezzlement of any part of the cargo,[1] but it is not a ground of forfeiture for a mariner to sell a part of the cargo to procure provisions by order of the mate during the absence of the master.[2] The general doctrine is, that all are liable to contribute from their wages to make good the cargo embezzled,[3] but they are not so liable unless it was caused by their fraud, or connivance, or negligence;[4] but the court may distinguish between the innocent and the guilty;[5] when not fixed on any person the presumption is that the guilt attaches to all.[6] They are answerable, unless it is clearly shown to

have been done by persons other than the crew.[7] If the seamen were absent at the time of the embezzlement they are not answerable.[8]

1 Mason v. The Blaireau, 2 Cranch, 240; Alexander v. Galloway, Abb. Adm. 261; Sundry Mariners v. The Kensington, 1 Pet. Adm. 239; Thompson v. Collins, 4 Bos. & P. 347; Lewis v. Davis, 3 Johns. 17. And compare Edwards v. Sherman, Gilp. 461; Joy v. Allen, 2 Wood. & M. 303; Spurr v. Pearson, 1 Mason, 104. And see Rev. Stats. sec. 4596.

2 Anderson v. The Solon, Crabbe, 17. See The Calliope, 2 Pet. Adm. 272.

3 Sullivan v. Ingraham, Bee, 182; Fogarty v. Pratt, 2 Amer. Law J. 238; Cranmer v. The Fair American, 1 Pet. Adm. 242.

4 Spurr v. Pearson, 1 Mason, 104; Sundry Mariners v. The Kensington, 1 Pet. Adm. 239; Hoyt v. Wildfire, 3 Johns. 518; Bellamy v. Russell, 2 Shaw, 167.

5 Edwards v. Sherman, Gilp. 468; Sullivan v. Ingraham, Bee, 182.

6 Spurr v. Pearson, 1 Mason, 110; Cranmer v. The Fair American, 1 Pet. Adm. 242; Sullivan v. Ingraham, Bee, 182.

7 Sundry Mariners v. The Kensington, 1 Pet. Adm. 239. But compare Edwards v. Sherman, Gilp. 461.

8 Joy v. Allen, 2 Wood. & M. 308; The Frederick v. The Fanny, Bee, 262; Sullivan v. Ingraham, Bee, 182.

§ 188. Forfeiture for incapacity.—One who takes employment of a specific character impliedly contracts for the exercise of reasonable skill in that particular capacity,[1] and a want of fidelity or want of capacity entitles the master to deduct from the wages.[2] A seaman shipping as an able seaman, but found incompetent, is entitled only to what his services are worth.[3] Where they become disabled by accident before voyage commences, they are entitled only to a reasonable sum for services rendered, but if disabled during the voyage, it is otherwise.[4] A seaman appointed as mate and removed for incapacity is entitled only to the original rate contracted for.[5] So, habitual drunkenness, if it incapacitates, is a ground for forfeiture; otherwise, it only goes to diminish compensation;[6] but slight acts of intemperance will not render a seaman incompetent.[7] Seamen do not forfeit wages by being disrated and put at other duties; they may claim reasonable wages.[8]

1 The Buena Vista, 3 Blatchf. 510; Forbes v. Parsons, Crabbe, 283.

2 Sherwood v. McIntosh, 1 Ware, 111; Atkyns v. Burrows, 1 Pet. Adm. 244.

3 Wheatley v. Hotchkiss, 1 Sprague, 225; S. C. 6 Law Rep. N. S. 692.

4 Ex parte Gidding, 2 Gall. 56.

5 Wood v. The Nimrod, Gilp. 83.

6 Orne v. Townsend, 4 Mason, 541. And see Rev. Stats. sec. 4602.

7 The George, 1 Mason, 35; The Exeter, 2 C. Rob. 261.

8 The Alonzo, 2 Ware, 318.

§ 189. Forfeiture for misconduct.—For a seaman willfully to do an act which puts the vessel in jeopardy is a breach of duty which may be considered in diminution or bar of wages,[1] but only when damages caused are the immediate result of his misconduct,[2] as a prolonged absence, endangering the safety of the ship.[3] To work a forfeiture, the misconduct must be continued or repeated, or be of a highly aggravated character.[4] Every hasty word or imprudent act should not be seized upon for the infliction of a forfeiture, but undoubted malignance and dangerous insubordination should be repressed with exemplary severity.[5] Disorderly and mutinous behavior and an obstinate refusal to do duty deprives a seaman of his claim for wages.[6] So, as to violence on the master by the mate,[7] or misconduct of an engineer in altering or deranging his engine;[8] but misconduct of the mate in temporary charge as master is not a ground for forfeiture of wages.[9] Seaman's wages upon a voyage already taken place cannot be forfeited on the subsequent voyage; and hiring continuously by the month upon river boats is like separate voyages at sea.[10] A seaman discharged for misconduct and afterwards received on board and his services accepted, does not forfeit his wages by reason of such misconduct.[11] An officer may be dismissed, and forfeit his wages for fraudulent, unfaithful, and illegal practices, gross and repeated negligence, flagrant, willful, and unjustifiable disobedience, and incapacity by his own fault, and palpable want of skill.[12]

1 Scott *v.* Russell, Abb. Adm. 253; Suckley *v.* Delafield, 2 Caines, 222.

2 Macomber *v.* Thompson, 1 Sum. 384.

3 Macomber *v.* Thompson, 1 Sum. 384; 7 Phila. 598.

4 The Maria, Blatchf. & H. 333; The Mentor, 4 Mason, 84; Thorne *v.* White, 1 Pet. Adm. 168; Relf *v.* The Maria, 1 Pet. Adm. 186; Black *v.* The Louisiana, 2 Pet. Adm. 268; Drysdale *v.* The Ranger, Bee, 148.

5 The Nimrod, 1 Ware, 18; Dixon *v.* The Cyrus, 2 Pet. Adm. 407; Thorne *v.* White, 1 Pet. Adm. 168; The Maria, Blatchf. & H. 333; The Exeter, 2 C. Rob. 261.

6 Humphreys *v.* The America, Bee, 237; Cloutman *v.* Tunison, 1 Sum. 373; Relf *v.* The Maria, 1 Pet. Adm. 186; U. S. *v.* Peterson, 1 Wood. & M. 305; The Moslem, Olcott, 289. And see Rev. Stats. sec. 4596.

7 Sprague *v.* Kain, Bee, 184; Hayes *v.* The J. J. Wickwire, 7 Phila. 594; The Mentor, 4 Mason, 84.

8 The John Martin, 1 Brown Adm. 149; The Magnet, Id. 547.

9 Airey *v.* The Ann C. Pratt, 1 Curt. 395.

10 The Pioneer, Deady, 72; Piehl *v.* The Balchen, Olcott, 24. And see Lang *v.* Holbrook, Crabbe, 179.

11 Lang *v.* Holbrook, Crabbe, 179; Thorne *v.* White, 1 Pet. Adm. 175.

12 Thompson *v.* Busch, 4 Wash. C. C. 341; Atkyns *v.* Burrows, 1 Pet. Adm. 244.

§ 190. Forfeiture for illegal traffic. — Seamen's wages on an illegal voyage are not, in general, a lien on the vessel;[1] but if they have no knowledge of its illegality, they are entitled to full wages.[2] If a vessel is engaged in the coasting trade without a license, and they are ignorant of that fact, their right to wages is not affected.[3]

1 The Langdon Cheves, 2 Mason, 58. And see Rev. Stats. sec. 4596.

2 Sheppard *v.* Taylor, 5 Peters, 675.

3 The Mary, 1 Sprague, 204.

§ 191. Discretionary power to decree forfeiture. Courts are not bound to decree a forfeiture of all wages for malfeasance and dereliction of duty at sea;[1] being invested with discretionary power,[2] they may mitigate the punishment to a case of mere compensation and indemnity to owners.[3] They may impose less than entire forfeiture,[4] and reduce it to a fine or mulct proportionate to the offense,[5] and may remit forfeiture on proof of contrition and repentance,[6] on offer to return in case of desertion,[7] or where the master took no means to cause them to return;[8] on an offer to return the master is bound to receive them,[9] if the offer be made within a reasonable time and in a respectful manner;[10] the return must be unconditional, and a return to duty;[11] an offer to return after five or six weeks was deemed insufficient.[12] If he seasonably returns to duty the forfeiture is cured,[13] but if on his return he refuses to do duty,[14] or if he returns in a clandestine manner the forfeiture inures.[15] Where a seaman, by his own fault, at an intermediate port, fails to rejoin his ship, the master is not bound to reinstate him upon the return of the vessel to the same port in the course of the voyage.[16] A subsequent reception of the offender is equivalent to a pardon,[17] and a forcible bringing back and returning to duty is a condonation of the offense.[18]

1 Swain *v.* Howland, 1 Sprague, 427; Gladding *v.* Constant, 1 Sprague, 73; Lovrein *v.* Thompson, 1 Sprague, 355; Gifford *v.* Kollock, 19 Law Rep. 21; The Moslem, Olcott, 247; The Baltic Merchant, Edw. Adm. 219; The Lima, 3 Hagg. Adm. 347; Cloutman *v.* Tunison, 1 Sum. 373; The Elizabeth Frith, 1 Blatchf. & H. 195.

2 Granon *v.* Hartshorne, Blatchf. & H. 462; The Cadmus, Ibid. 139; The Swallow, Olcott, 10; The Malta, 2 Hagg. Adm. 158; The Moslem, Olcott, 247; Cloutman *v.* Tunison, 1 Sum. 373; The Martha, Blatchf. & H. 151; The Balize, 1 Brown Adm. 429; The John Martin, 2 Abb. U. S. 72; Lovrein *v.* Thompson, 1 Sprague, 355; Swan *v.* Howland, Ibid. 424; Gifford *v.* Kollock, 19 Law Rep. 21; The Union, Blatchf. & H. 545. And see Rev. Stats. sec. 4610.

3 Coffin *v.* Shaw, 3 Ware, 83; Gifford *v.* Kollock, 9 Law Rep. N. S. 21; The Balize, 1 Brown Adm. 429; Lovrein *v.* Thompson, 1 Sprague, 355; Swain *v.* Howland, 1 Sprague, 424. And see Rev. Stats. sec. 4610.

4 The Ballze, 1 Brown Adm. 429; The Union, 4 Blatchf. 90.

5 The Swallow, Olcott, 10.

6 The Mentor, 4 Mason, 94; Humphreys v. The America, Bee, 237; Sprague v. Kain, Bee, 184; Johnson v. The Eliza, not reported; Drysdale v. The Ranger, Bee, 148; Whitton v. The Commerce, 1 Pet. Adm. 160; The Nimrod, 1 Ware, 18; Dixon v. The Cyrus, 2 Pet. Adm. 407; Beale v. Thompson, 4 East, 545; Black v. The Louisiana, 2 Pet. Adm. 268; Thorne v. White, 1 Pet. Adm. 168; The Exeter, 2 C. Rob. 261; Lovrein v. Thompson, 1 Sprague, 355; Atkyns v. Burrows, 1 Pet. Adm. 244; Relf v. The Maria, 1 Pet. Adm. 186; Miller v. Brant, 2 Camp. 590; Sherwood v. McIntosh, 1 Ware, 117.

7 Swain v. Howland, 1 Sprague, 427; Coffin v. Jenkins, 3 Story, 109; The Ballze, 1 Brown Adm. 429; The John Martin, 2 Abb. U. S. 183; The Philadelphia, Olcott, 216.

8 Magee v. The Moss, Gilp. 232; Dixon v. The Cyrus, 2 Pet. Adm. 407. But see The Union v. Jansen, 2 Paine, 277.

9 Cloutman v. Tunison, 1 Sum. 373.

10 Coffin v. Jenkins, 3 Story, 108; Scully v. The Great Eastern, 1 Sawy. 33; Whitton v. The Commerce, 1 Pet. Adm. 160; Cloutman v. Tunison, 1 Sum. 373.

11 The Catawanteak, 2 Ben. 189; The Phœbe v. Dignum, 1 Wash. C. C. 48.

12 Weeks v. The B. F. Bruce, Newb. 539.

13 Ingraham v. Albee, Blatchf. & H. 289; The Otis, Crabbe, 52; Snell v. The Independence, Gilp. 140; The Elizabeth v. Rickers, 2 Paine, 291; Whitton v. The Commerce, 1 Pet. Adm. 160; The John Martin, 2 Abb. U. S. 183; The Philadelphia, Olcott, 219.

14 Snell v. The Independence, Gilp. 140; The Cadmus v. Matthews, 2 Paine, 221.

15 The Philadelphia, Olcott, 216; Allen v. Hallet, Abb. Adm. 577.

16 Scully v. The Great Republic, 1 Sawy. 31.

17 The Mentor, 4 Mason, 96; Atkyns v. Burrows, 1 Pet. Adm. 244; Beale v. Thompson, 4 East, 545; Miller v. Brant, 2 Camp. 590; Whitton v. The Commerce, 1 Pet. Adm. 160.

18 Freeman v. Baker, Blatchf. & H. 372.

§ 192. Offenses of seamen generally.—Confining a master on board an American vessel is a punishable offense.[1] To constitute the offense, the act must be feloniously done.[2] It may be by moral as well as physical restraint, preventing his free movements and his command of the ship.[3] Surrounding him and preventing him from moving where he pleases, under threats of force, or restraining him from going to any part of the vessel by an avowed determination to resist him, is a confinement of the master;[4] but an assault and battery by a seaman upon the master does not amount to a confinement, nor an attempt to commit a revolt.[5] To constitute the offense of running away with a vessel, the command of the vessel must be taken from the captain, or without his consent, feloniously, and with intent to convert the vessel and its cargo.[6]

1 U. S. v. New Bedford Bridge, 1 Wood. & M. 496; U. S. v. Stevens, 4 Wash. C. C. 547.

2 U. S. v. Henry, 4 Wash. C. C. 428.

3 U. S. v. Thompson, 1 Sum. 163.

4 U. S. v. Hemmer, 4 Mason, 106; U. S. v. Bladen, Pet. C. C. 213; U. S. v. Smith, 3 Wash. C. C. 527; U. S. v. Sharp, Pet. C. C. 118.

5 U. S. v. Lawrence, 1 Cranch C. C. 94.

6 U. S. v. Haskell, 4 Wash. C. C. 402.

§ 193. Endeavor to make a revolt.—An endeavor to make a revolt is an offense, under the act of Congress.[1] A combination of the crew, so as to prevent the vessel from going to sea, is an attempt to commit a revolt.[2] It is not necessary that an endeavor to commit a revolt should be upon the high seas.[3] An endeavor to commit a revolt may be by stirring up or encouraging or combining with others to produce a disobedience to any lawful order of the master or officers.[4] An endeavor to excite the crew to overthrow the lawful authority of the master and officers of the ship is an endeavor to make a revolt.[5] The endeavor of one or more to overthrow the legitimate authority of the master, with intent to remove him from command, or against his will, to assume government and navigation of the vessel, or to transfer their obedience to some other person, is an attempt to make a revolt.[6] If a crew combine to refuse to do duty and actually refuse until the master complies with some improper request on their part, it is an endeavor to create a revolt.[7] So of any act done in pursuance of such conspiracy and combination, and any endeavor to stir up the crew to such resistance,[8] but a mere conspiracy to make a revolt is not an endeavor, unless accompanied by some act tending to that result.[9] Where there is a deviation from the voyage in the shipping articles, a subsequent refusal to do duty on that account does not constitute an endeavor to create a revolt;[10] nor if the combination of the crew was to compel the master to return to port for the unseaworthiness of the vessel, if the seamen act *bona fide*.[11] Where the crew interposed to prevent the infliction of punishment on one of their number, and compelled the master, by acts of violence and intimidation, to desist therefrom, it is an endeavor to commit a revolt.[12]

1 U. S. v. Nye, 2 Curt. 227; U. S. v. Barker, 5 Mason, 404; U. S. v. Haines, 5 Mason, 272; U. S. v. Gardner, Ibid. 402. And see Rev. Stats. sec. 5389.

2 U. S. v. Nye, 2 Curt. 227; U. S. v. Gardner, 5 Mason, 402; U. S. v. Haines, 5 Mason, 272; U. S. v. Barker, 5 Mason, 404; Regina v. McGregor, 1 Carr. & K. 429; U. S. v. Lynch, 2 N. Y. Leg. Obs. 51.

3 U. S. v. Hamilton, 1 Mason, 443; U. S. v. Seagrist, 4 Blatchf. 420; U. S. v. Keefe, 3 Mason, 475.

4 U. S. v. Thompson, 1 Sum. 168; U. S. v. Roberts, 2 N. Y. Leg. Obs. 99.

5 U. S. v. Smith, 1 Mason, 147; U. S. v. Smith, 3 Wash. C. C. 528; U. S. v. Turner, 2 N. Y. Leg. Obs. 256.

6 U. S. v. Kelly, 11 Wheat. 417.

7 U. S. v. Gardner, 5 Mason, 403; U. S. v. Haines, Ibid. 272; U. S. v. Hemmer, 4 Mason, 107; U. S. v. Bladen, Pet. C. C. 213.

8 U. S. v. Hemmer, 4 Mason, 107; U. S. v. Smith, 1 Mason, 147; U. S. v. Sharp, Pet. C. C. 118; The Exeter, 2 C. Rob. 261. And see U. S. v. Kelly, 11 Wheat. 449.

9 U. S. v. Kelly, 4 Wash. C. C. 530.

10 U. S. v. Matthews, 2 Sum. 470. And see Rev. Stats. sec. 5359.

11 U. S. v. Ashton, 2 Sum. 13; U. S. v. Staly, 1 Wood. & M. 338.

12 U. S. v. Morrison, 1 Sum. 448.

§ 194. Revolt or mutiny of crew.—A revolt is an open mutiny or rebellion against the authority of the master in the command, navigation, and control of the vessel.[1] A mere disobedience of orders by one or two of the seamen, without combination with the others, or offensive or insolent language, is not a revolt.[2] A revolt consists not only in attempts to usurp the command from the master, or to transfer it to another, or to deprive him of it for any purpose by violence, but in resisting him in the free and lawful exercise of his authority;[3] the overthrowing of the legal authority of the master, with the intent to remove him against his will, and to take possession of the vessel by assuming the command and navigation,[4] where the crew, or any part thereof, take possession of the vessel against the will and in defiance of the authority of the master, and control and navigate her against his will and orders;[5] a total suspension of the command of the master, by refusal to obey any and all orders;[6] a common confederacy to refuse to do further duty, and to resist the lawful commands of the officers in regard to sailing and preparation;[7] the mere resistance to the authority of the master.[8] If the master be prevented from carrying into effect any one lawful command, it is a revolt, and a command to continue the business of whaling is *prima facie* lawful.[9] A mate is a seaman within the act for punishing seamen for mutiny.[10] The act prescribing punishment of crew for making a revolt applies only to American vessels,[11] but foreign seamen thereon are punishable.[12]

1 U. S. v. Forbes, Crabbe, 560; U. S. v. Haines, 5 Mason, 272; U. S. v. Peterson, 1 Wood. & M. 310; U. S. v. Savage, 5 Mason, 460; U. S. v. Kelly, 10 Wheat. 417. And see Rev. Stats. sec. 5359.

2 U. S. v. Forbes, Crabbe, 558.

3 U. S. v. Peterson, 1 Wood. & M. 305; U. S. v. Cassedy, 2 Sum. 582; U. S. v. Hemmer, 4 Mason, 107; U. S. v. Savage, 5 Mason, 460.

4 U. S. v. Kelly, 11 Wheat. 417; S. C. 4 Wash. 528.

5 U. S. v. Hemmer, 4 Mason, 107; U. S. v. Smith, 1 Mason, 147; U. S. v. Sharp, Pet. C. C. 118; U. S. v. Bladen, Ibid. 213; The Exeter, 2 C. Rob 261.

6 U. S. v. Nye, 2 Curt. 227; U. S. v. Gardner, 5 Mason, 402; U. S. v. Barker, 5 Mass. 404; U. S. v. Haines, 5 Mason, 272.

7 U. S. v. Nye, 2 Curt. 227; U. S. v. Cassedy, 2 Sum. 582; U. S. v. Lynch, 2 N. Y. Leg. Obs. 51. And see Rev. Stats. sec. 5360.

8 U. S. v. Peterson, 1 Wood. & M. 310; U. S. v. Smith, 3 Wash. 78; U. S. v. Cassedy, 2 Sum. 582; U. S. v. Haines, 5 Mason, 272; U. S. v. Keefe, 3 Mason, 475; U. S. v. Savage, 5 Mason, 460; U. S. v. Bladen, Pet. C. C. 213.

9 U. S. v. Borden, 1 Sprague, 374.

10 U. S. v. Savage, 5 Mason, 490; U. S. v. Turner, 2 N. Y. Leg. Obs. 256. And see Rev. Stats. sec. 5360.

11 U. S. v. Rogers, 3 Sum. 342; U. S. v. Lynch, 1 N. Y. Leg. Obs. 388; U. S. v. Jenkins, Id. 344. And see Rev. Stats. sec. 5360.

12 U. S. v. Crawford, 1 N. Y. Leg. Obs. 388; U. S. v. Jenkins, Id. 344.

§ 195. Effect of imprisonment for offenses.—When a seaman is imprisoned in a foreign country for violation of its laws, the costs and charges may be deducted from his wages,[1] and a charge for the expense of a substitute.[2] Arrest and imprisonment in a foreign port, for crime, and return to his home by public authority, do not necessarily constitute a bar to the claim for wages.[3] So seamen already punished in a criminal proceeding ought not, for the same offense, to forfeit their wages.[4]

1 Magee v. The Moss, Gilp. 219; Brower v. The Maiden, Gilp. 294; The Cadmus, Blatchf. & H. 139. See Rev. Stats. sec. 4605.

2 Brower v. The Maiden, Gilp. 294.

3 Smith v. Treat, 2 Ware, (Dav.) 266; Wood v. The Nimrod, Gilp. 82.

4 Hill v. The Triumph, 2 N. Y. Leg. Obs. 115; The Olive Chamberlain, 1 Sprague, 10. And see Wood v. The Nimrod, Gilp. 83; The Mentor, 4 Mason, 84; Thomas v. Gray, Blatchf. & H. 505.

tell, 1 Cliff. 135; The Aberfoyle, Abb. Adm. 242; Leary v. U. S. 14; Wall. 607; The Erie, 3 Ware, 225; 12 Law Rep. N. S. 152; Byrne v. Pattinson, cited Abb. on Sh. 335.

5 Leary v. U. S. 14 Wall. 607; The Erie, 3 Ware, 225; 12 Law Rep. N. S. 152; Drinkwater v. The Spartan, 1 Ware, 156.

6 Mott v. Ruckman, 3 Blatchf. 71; S. C. 16 Law Rep. N. S. 397; Hill v. The Golden Gate, Newb. 309.

7 Hill v. The Golden Gate, Newb. 309.

§ 197. Who may make.—The master of a vessel, in a foreign port, may make a charter party when no agent of the owners is present.[1] A charter party, made in good faith by the managing owner and ship's husband, is binding on all interested in the vessel.[2] A master cannot make a charter party for the purpose of giving a creditor a security for the debt due him;[3] nor can he vary the contract made by the owners, so as to exonerate goods shipped from the lien for freight.[4]

1 The Freeman v. Buckingham, 18 How. 191; Grant v. Norway, 10 Com. B. 104; Hurry v. Hurry, 2 Wash. C. C. 145; Hubbersty v. Ward, 8 Exch. 330; Walter v. Brewer, 11 Mass. 99.

2 Bangs v. Lowber, 2 Cliff. 157. And see Clarkson v. Edes, 4 Cow. 470; Marcardler v. The Chesapeake Ins. Co. 8 Cranch, 49.

3 Hurry v. Hurry, 2 Wash. C. C. 145.

4 The Salem, 1 Sprague, 389; Gracie v. Palmer, 8 Wheat, 605, reversing 4 Wash. C. C. 110.

§ 198. Construction and interpretation.—Charter parties are to be liberally construed in furtherance of the real intent of the parties and the usages of trade,[1] the intent to be gathered from the language of the individual instrument.[2] It is not to be inferred from single clauses or single facts, but from the whole tenor of the instrument, construed in the light of facts which are admissible in explanation of its intent and meaning.[3] They are to be construed according to their primary acceptation, and the first rule is the interest of the parties, as evinced by the text of the instrument.[4] When the meaning is clear, it is conclusive.[5] When a contract is indivisible in terms, carrying the whole and for the whole voyage is a condition precedent.[6] A charter party is to be considered divisible for the purpose of freight, whenever it can be inferred that a division of the voyage was contemplated.[7] Proof of usage is admissible to interpret the otherwise indeterminate intentions of the parties, and ascertain the nature and extent of their contract, arising from implications and presumptions and acts of a doubtful and equivocal character;[8] but not to contradict or defeat express stipulations restricting or enlarging customary rights.[9] It may also be admitted to ascertain the true meaning of a par-

ticular word, or words, when they have various senses.[10] Loose and unconclusive usages and customs are not to outweigh the well known and well settled principles of law.[11] The validity, nature, and interpretation of contracts is governed by the law of place where they are to be performed, unless void by the law of the place where made.[12] In their interpretation, the decisions of the common-law courts are entitled to the highest consideration and weight.[13] The rule of construction as to exceptions is that they are to be taken most strongly against the party for whose benefit they are introduced.[14] Conversations before and at the time of the contract are merged in the contract.[15]

1 Raymond *v.* Tyson, 17 How. 59; The Volunteer, 1 Sum. 551; Richardson *v.* Winsor, 3 Cliff. 402; Gracie *v.* Palmer, 8 Wheat. 605; Ruggles *v.* Buckner, 1 Paine, 358; Donahoe *v.* Kettell, 1 Cliff. 141; Certain Logs of Mahogany, 2 Sum. 589; Campion *v.* Colvin, 3 Bing. N. C. 17.

2 Lowler *v.* Bangs, 2 Wall. 736; S. C. 2 Cliff. 164; Ritchie *v.* Atkinson, 10 East, 295; Kleine *v.* Catara, 2 Gall. 74; Seeger *v.* Duthie, 8 Com. B. N. S. 45.

3 The Aberfoyle, Abb. Adm. 255; The Volunteer, 1 Sum. 551; Kimball *v.* The Anna Kimball, 2 Cliff. 4; S. C. 3 Wall. 43; Donahoe *v.* Kettell, 1 Cliff. 141; The Bird of Paradise, 5 Wall. 558; Alsager *v.* St. Katharine's Dock Co. 14 Mees. & W. 794.

4 Rich *v.* Parrott, 1 Cliff. 55.

5 The Hermitage, 4 Blatchf. 474.

6 Weston *v.* Minot, 3 Wood. & M. 442; Clarke *v.* Gurnell, 1 Bulst. 167; Rex *v.* Jones, 8 East, 451; Barker *v.* Cheriot, 2 Johns. 351; Coffin *v.* Storer, 5 Mass. 252; Sampayo *v.* Salter, 1 Mason, 43.

7 The Erie, 3 Ware, 225; S. C. 12 Law Rep. N. S. 152.

8 Bliven *v.* The New Eng. Screw Co. 23 How. 432; The Reeside, 2 Sum. 567; Oelricks *v.* Ford, 23 How. 63; Blackett *v.* Royal Exch. Assn. Co. 2 Camp. & J. 244; Broadwell *v.* Butler, 6 McLean, 301; The Emma, 2 W. Rob. 315; The Cleveland, Newb. 224.

9 Hart *v.* Shaw, 1 Cliff. 366; The Reeside, 2 Sum. 567; Dixon *v.* C. & I. R. R. Co. 4 Biss. 142; Palmer *v.* Blackburn, 1 Bing. 61; Trueman *v.* Loder, 11 Adol. & E. 589; Hearne *v.* Mar. Ins. Co. 20 Wall. 492; Blackett *v.* Royal Exch. Assn. Co. 2 Cromp. & J. 244; Crofts *v.* Marshall, 7 Car. & P. 607; Phillips *v.* Briard, 1 Hurl. & M. 21; Insurance Comps. *v.* Wright, 1 Wall. 470; Barnard *v.* Kellogg, 10 Wall. 391; Knox *v.* The Ninetta, Crabbe, 543; Broadwell *v.* Butler, 6 McLean, 301; The Cleveland, Newb. 224; The Emma, 2 W. Rob. 315.

10 The Reeside, 2 Sum. 567; Broadwell *v.* Butler, Newb. 175; Pierpont *v.* Towle, 2 Wood. & M. 44.

11 Thompson *v.* Riggs, 5 Wall. 690; The Reeside, 2 Sum. 567; Merchants' Bank *v.* State Bank, 10 Wall. 668.

12 Pope *v.* Nickerson, 3 Story, 480, denying Malpica *v.* McKown, 1 La. 248; and Arago *v.* Currel, 1 La. 528.

13 The Nathaniel Hooper, 3 Sum. 555; The Isabella Jacobina, 4 C. Rob. 77.

14 Airey v. Merrill, 2 Curt. 11; Blackett v. Royal Exch. Assn. Co. 2 Cromp. & J. 244.

15 The Wellington, 1 Biss. 281; Barber v. Brace, 3 Conn. 9.

§ 199. Conclusiveness of terms.—The terms in a charter party are conclusive.[1] Where the consignees had notice of its existence, it alone must be looked to as the contract,[2] and a bill of lading given to the charterer for his goods is subordinate to the charter party, and not to enlarge or diminish the rights thereby created,[3] but the contract of affreightment may be varied and adapted to the exigencies of either party.[4] A new contract of extension does not deprive the charterer of the benefit of lay days for unloading the vessel, as provided in the original contract.[5] An agent of the charterer, at the port of discharge, may change the terms and conditions of the contract.[6]

1 Weston v. Minot, 3 Wood. & M. 436; Perkins v. Currier, Ibid. 81.

2 The Ethel, 5 Ben. 154.

3 The Eliza, 1 Low. 86; Lamb v. Parkman, 1 Sprague, 343.

4 Raymond v. Tyson, 17 How. 60; Gracie v. Palmer, 8 Wheat. 605.

5 Swain v. U. S. Dev. Ct. Cl. 35.

6 Cargo of Salt, 4 Blatchf. 224.

§ 200. Terms construed.—"To be employed" means not only the act of doing anything, but also to be engaged to do it; to be under contract or orders.[1] "Empty" means without cargo.[2] Under the term, "the charterer furnishing the lining, hides, and bones for dunnage only," parties claiming under a bill of lading are entitled to damages for injury to the cargo.[3] The terms "incident to the navigation of the river" have the same signification as the words "perils of navigation," or "dangers of the seas," or "dangers of navigation."[4] The covenant, "dangers of the seas excepted," does not cover a loss by fire originating on board.[5] "With all possible dispatch," is a warranty, and goes to the root of the contract, and is a condition precedent to the right of recovery.[6] "Dispatch in discharging," where this is provided, the vessel is entitled to demurrage for delay caused in waiting her turn in respect to other vessels.[7] "Sail with all convenient speed," the object of the voyage must be wholly frustrated by the breach of the stipulation.[8] That the vessel should proceed "thence direct to load under this charter"; held, that the contract would have been the same if the word "direct" had been omitted.[9] The covenant, "ship to proceed from Melbourne to Calcutta with all possible dispatch," is a condition precedent to the right of the owner to recover.[10] The excep-

tion, "ordinary wear, and the dangers of the seas excepted," does not relieve the charterer from liability from destruction by fire.[11] Where the terms were, "with towage," it was held that charterers are not bound to furnish the towboat, but only to pay for it.[12]

1 U. S. v. The Catherine, 2 Paine, 721.

2 Perrine v. Chesapeake & Del. Can. Co. 9 How. 172.

3 The Wilhelmina, 3 Ben. 110.

4 The Walthan, 13 Opin. Att. Gen. 119.

5 Airey v. Merrill, 2 Curt. 8.

6 Lowber v. Bangs, 2 Wall. 728; S. C. 2 Cliff. 157; 8 Law Ti. 207; Deshon v. Fosdick, 1 Woods, 289; Behn v. Burness, 3 Law Ti. N. S. 207; Olive v. Booker, 1 Exch. 416; Oliver v. Fielden, 4 Exch. 135; Ritchie v. Atkinson, 10 East, 293; Seeger v. Duthie, 8 Com. B. N. S. 45; Tarrabochia v. Hickie, 1 Exch. 183; 3 Eng. L. & E. 539; Dimech v. Corlett, 12 Moore P. C. C. 199; Adams v. Royal M. S. P. Co. 5 Com. B. N. S. 492; Constable v. Cloberte, Palmer, 397; Clipsham v. Vertue, 5 Ad. & E. N. S. 265.

7 Keen v. Audenried, 5 Ben. 535; S. C. 15 Int. Rev. Rec. 91. And see Hooe v. Groverman, 1 Cranch, 214.

8 Bangs v. Lowber, 2 Wall. 753; S. C. 2 Cliff. 166; Hurst v. Usborne, 18 Com. B. 144.

9 The Onrust, 6 Blatchf. 533, affirming 1 Ben. 445; Duncan v. Topham, 8 Com. B. 225.

10 Fearing v. Cheeseman, 3 Cliff. 94; Lowber v. Bangs, 2 Wall. 728; S. C. 2 Cliff. 157; 8 Law Ti. 207.

11 Merrill v. Airey, 3 Ware, 215.

12 Keen v. Audenried, 5 Ben. 535.

§ 201. Stipulations in.—The ordinary clause as to goods refers to kind, rather than to the amount; to their quality, and not their quantity.[1] Under a stipulation to provide certain enumerated articles, charterers are bound to provide necessary and proper articles for the use of passengers.[2] A stipulation that the master is to purchase a particular article, the charterer to pay the invoice price, etc., and the freight, does not exonerate the charterer from liability for the freight, if the articles specified cannot be procured. In such case, after waiting the usual number of lay days, the master may sail, and recover empty for full.[3] A clause, that during obstructions to navigation the lay days are not to be counted, applies to such obstructions as prevent lading as well as going to sea.[4] The charterer is presumed to have known the size and character of the vessel and the state of the harbor at the place of landing;[5] and a stipulation of a certain depth includes the same depth in the river below, if that depth be necessary.[6] A warranty of sufficient depth "at the place of loading" means a sufficient depth to enable the vessel to make her voyage.[7] A stipulation for a lien does not affect the lia-

bility of the vessel.[8] Where the charterer agreed to pay a round sum for the voyage, all port charges, pilotage, etc., and to advance at the outward port what the master might require, not exceeding one half the charter, no proportionate part of the charter money is due where the voyage was not completed.[9] In order to have the effect of consolidating the outward and home voyages for the purposes of freight, it must be made to appear from conditions in the instrument, or from its whole tenor.[10] Whether stipulations are to be considered conditions precedent, must in all cases depend on the intent, as gathered from the instrument itself.[11] Where it was stipulated that a license should be procured, as a condition of the contract, but in ignorance of the legality of the act, the charter party is void; but liability may attach to obligations growing out of the transaction.[12] A stipulation providing for an "absolute lien on the cargo for all freight, dead freight, and demurrage," held to include dead freight and demurrage within the operation of the general provision.[13] A clause binding the ship and goods respectively, is valid.[14] Where the stipulation was that charterers were to furnish a return cargo, and among other articles "sufficient saltpeter or its equivalent for ballast," in order to constitute a compliance, the goods must be heavy goods, suitable for ballasting.[15] The words "a second safe port" imply a port which the vessel could enter and depart from without legal restraint, and without incurring more than the ordinary perils of the sea.[16]

1 Weston v. Minot, 3 Wood. & M. 436.

2 Weston v. Train, 2 Curt. 49.

3 Clarke v. Crabtree, 2 Curt. 87, affirming S. C. 1 Sprague, 217; Kleine v. Catara, 2 Gall. 61.

4 Ladd v. Wilson, 1 Cranch C. C. 293.

5 Belmont v. Tyson, 3 Blatchf. ——.

6 Shaw v. Hart, 1 Sprague, 567.

7 Hart v. Shaw, 1 Cliff. 358.

8 The General Sheridan, 2 Ben. 294; Webb v. Anderson, Taney, 504; The Volunteer, 1 Sum. 577; Pickman v. Woods, 6 Pick, 248.

9 Donahoe v. Kettell, 1 Cliff. 135; Barker v. Cheviot, 2 Johns. 351.

10 The Erie, 3 Ware, 231; Locke v. Swan, 13 Mass. 76.

11 Lowber v. Bangs, 2 Wall. 736; S. C. 2 Cliff. 164; Seeger v. Duthie, 8 Com. B. N. S. 45; Smoot's Case, 15 Wall. 48; Avery v. Bowden, 5 El. & B. 714; 6 Ibid. 953.

12 Wilson v. Leroy, 1 Brock. 447.

13 The Bird of Paradise, 5 Wall. 559.

14 The Volunteer, 1 Sum. 573; Paul v. Birch, 2 Ark. 62.

15 Rich v. Parrott, 1 Cliff. 55.

16 Atkins v. Fibre Disintegrating Co. 2 Ben. 381.

§ 202. Seaworthiness.—In a charter party there is an implied covenant of seaworthiness, though none is expressed;[1] but the words "charter and to freight let" do not imply a covenant that the vessel is seaworthy.[2] Where the owners are ignorant of the destination, of the service, and the use to which the vessel is to be put, there is no implied warranty of sea-going qualities.[3] The presumption of seaworthiness is rebutted by the disabling or breaking of a shaft shortly after the date of the contract, and without extraordinary circumstances to account for it.[4] If there was a latent defect the owners will be liable for damages occasioned thereby.[5] The burden of showing unseaworthiness when the charterer refuses to furnish the cargo, is on the owners of the vessel.[6] Fraud is not imputable to the owners, if they make no representations of seaworthiness, and afford the agents of the charterers ample facilities for inspection.[7] Repairs becoming necessary in case of disaster are at the charge of the vessel or owners.[8] To be seaworthy the vessel must be supplied with suitable compasses.[9]

1 Wilson v. Griswold, 15 Int. Rev. Rec. 27; Lyon v. Mells, 5 East, 428.

2 Bowle v. Wheelwright, 2 Cranch C. C. 167.

3 Richardson v. The U. S. 2 Ct. of Cl. 483.

4 Werk v. Leathers, 1 Woods, 271.

5 Werk v. Leathers, 1 Woods, 271.

6 The Vincennes, 11 Law Rep. N. S. 616.

7 Richardson v. The U. S. 2 Ct. of Cl. 483.

8 Reed v. U. S. 11 Wall. 605; Havelock v. Geddes, 10 East, 555; Hawkins v. Twizell, 5 El. & B. 883.

9 Lord v. G. N. & P. S. Co. 4 Sawy. 292.

§ 203. Capacity and measurement of vessel.—A charter party may be construed with reference to the space of net measurement for the cargo.[1] Owners are not bound to take on board a greater quantity of goods than the vessel, looking to her tonnage, shape, and draft, could carry in safety.[2] Where the master took on board all he thought the vessel would safely carry, his honest opinion can only be controlled by decisive evidence of a mistake on his part.[3] If goods received on board, from their weight, sink the vessel as low as is usual and proper, without extra danger, the owner or master may refuse to take on more cargo.[4] The test of safety is the depth the vessel was built to draw—that which her officers or experts on the spot reported to be proper—and which other

vessels considered their comparative tonnage. The opinion of the master, that the cargo taken on board is all that the vessel will safely carry, or a survey of the vessel by another sea captain, is not conclusive as to the proper depth to load the vessel.[5] The vessel is not liable *in rem* for misrepresentations or concealment of facts by her master or owner in respect to her tonnage or capacity,[6] but fraudulent representations may defeat right to freight.[7] Where the charter party stated the tonnage of the vessel, any other agreement as to her capacity is waived, and evidence of false representations is inadmissible.[8] Where the whole vessel was chartered to be supplied with a full cargo of merchandise, and also passengers, the vessel is bound to load to the extent of her capacity, and to furnish space for the accommodation of the specified number of passengers.[9] The blame of not substituting light articles for heavy, rests on the charterers in not filling the vessel before reaching a suitable depth, provided the vessel had reached the depth before the master refused to take more.[10]

1 Schmidt *v.* Smith, 7 Ben. 361.

2 Weston *v.* Minot, 3 Wood. & M. 446; Hunter *v.* Fry, 2 Barn. & Ald. 421.

3 Boyd *v.* Moses, 7 Wall. 319; Weston *v.* Foster, 2 Curt. 119.

4 Weston *v.* Minot, 3 Wood. & M. 449; Barber *v.* Brace, 3 Conn. 9.

5 Weston *v.* Minot, 3 Wood. & M. 436.

6 The Eli Whitney, 1 Blatchf. 360.

7 Weston *v.* Minot, 3 Wood. & M. 448; Johnson *v.* Miln, 14 Wend. 195.

8 Baker *v.* Ward, 3 Ben. 499.

9 Ogden *v.* Parsons, 37 Hunt's Mer. Mag. 710.

10 Weston *v.* Minot, 3 Wood. & M. 449; Barber *v.* Brace, 3 Conn. 9.

§ 204. Contract, when a mere affreightment.— When the general owner retains the possession, command, and navigation of the vessel, and contracts to carry a cargo on freight for the voyage, the charter party is a mere contract of affreightment sounding in covenant, and the owner is responsible for the conduct of the master and mariners.[1] Such a contract is a mere covenant for conveyance of merchandise, or performance of a stipulated service,[2] and a consignee of the charterer will not be protected in dealing with him as owner for the voyage.[3] Where the owners are to pay for the victualing and manning, and furnish the vessel victualed and manned, and the charterers were to pay all other charges and pay a specific freight, the general owners were owners for the voyage.[4] Where the ship is to be navi-

Erie, 3 Ware, 226, explaining Marquand v. Bauner, 36 Eng. L. & E. 139.

8 The Volunteer, 1 Sum. 551; Palmer v. Gracie, 4 Wash. C. C. 122, explaining Hutton v. Bragg, 7 Taunt. 14; 2 Marsh. 339; Phillips v. Rodie, 15 East, 547; McIntyre v. Bowne, 1 Johns. 229; Kleine v. Catara, 2 Gall. 61.

9 Hooe v. Groverman, 1 Cranch, 214; The Volunteer, 1 Sum. 151.

10 Reed v. U. S. 11 Wall. 601; Taggard v. Loring, 16 Mass. 336; Donahoe v. Kettell, 1 Cliff. 135; Hill v. The Golden Gate, Newb. 314; The Volunteer, 1 Sum. 551; Drinkwater v. The Spartan, 1 Ware, 150; Gracie v. Palmer, 8 Wheat. 605; Clarkson v. Edes, 4 Cow. 470; Christie v. Lewis, 2 Brod. & B. 410; Saville v. Campion, 2 Barn. & Adol. 503; Perkins v. Hill, 1 Sprague, 124.

11 Sandeman v. Scurr, Law Rep. 2 Q. B. 96.

12 Richardson v. Winsor, 3 Cliff. 406; Colvin v. Newberry, 6 Bligh, 187.

13 Ward v. Thompson, Newb. 95.

14 Certain Logs of Mahogany, 2 Sum. 589; Raymond v. Tyson, 17 How. 63; The Aberfoyle, Abb. Adm. 252, 255.

15 Donahoe v. Kettell, 1 Cliff. 139; Christie v. Lewis, 2 Brod. & B. 410; Saville v. Campion, 2 Barn. & Adol. 503; Certain Logs of Mahogany, 2 Sum. 589; Richardson v. Winsor, 3 Cliff. 399; Dean v. Hogg, 10 Bing. 345; Palmer v. Gracie, 4 Wash. C. C. 110; Hooe v. Groverman, 1 Cranch, 214.

§ 205. Charterer, when owner for voyage.—A person may be owner for the voyage who, by contract, hires the ship for the voyage,[1] if he is to have exclusive possession, control, and management, to appoint the master, run the vessel, and receive the entire profits, and will be responsible for damages and contracts.[2] He may appoint the master and crew, and becomes responsible for their acts;[3] but otherwise he is not so liable.[4] The appointment of the master and crew is not in all cases conclusive,[5] as the owner may be liable according to a particular custom.[6] If the nature of the service and due attainment of the object of the voyage requires the vessel to be absolutely under the control and subject to the orders and direction of the charterers, it will be construed as a demise of the vessel,[7] and the services of the master and crew pass as accessorial to the principal subject-matter of the contract, and they attorn to it, and become servants of the charterer.[8] Charter parties may be and sometimes are so framed that the vessel herself is let to hire. In such cases the charterer becomes the owner for the term, and the master and crew become servants of the charterer, and are bound to obey his orders.[9] In a charter party of the second kind, not only the entire capacity of the vessel itself and the possession is passed to the charterer, but the entire control and management is given up to him;[10] and where it operates as a demise of the vessel, the charterer becomes liable as owner of the vessel,[11] and the general owner loses his lien for freight,[12] the charterer being

substituted in his place. The master may be owner for the voyage,[13] and when so he cannot bind the general owners personally for supplies which he, as charterer, was bound to furnish.[14]

1 Certain Logs of Mahogany, 2 Sum. 597; The Volunteer, 1 Sum. 569; Clarkson *v.* Edes, 4 Cowen, 470; Hooe *v.* Groverman, 1 Cranch, 214; Marcardier *v.* Chesapeake Ins. Co. 8 Cranch, 39; The Nathaniel Hooper, 3 Sum. 577; McIntyre *v.* Bowne, 1 Johns. 229; Webb *v.* Peirce, 1 Curt. 106. And see Rev. Stats. sec. 4286.

2 Hill *v.* The Golden Gate, Newb. 308; Winter *v.* Simonton, 3 Cranch C. C. 104; Gracie *v.* Palmer, 8 Wheat. 632; Marcardier *v.* Chesapeake Ins. Co. 8 Cranch, 39; Kleine *v.* Catara, 2 Gall. 75; The Volunteer, 1 Sum. 566; Clarkson *v.* Edes, 4 Cowen, 470; Certain Logs of Mahogany, 2 Sum. 597.

3 Reed *v.* U. S. 11 Wall. 601; Campbell *v.* Perkins, 8 N. Y. 430; Donahoe *v.* Kettell, 1 Cliff. 138; Marcardier *v.* Chesapeake Ins. Co. 8 Cranch, 39; Hooe *v.* Groverman, 1 Cranch, 214.

4 Reed *v.* U. S. 11 Wall. 601; Peckman *v.* Woods, 3 Mass. 481.

5 Drinkwater *v.* The Spartan, 1 Ware, 160; Trinity House *v.* Clark, 4 Maule & S. 288.

6 The Waldo, 2 Ware, 165; Emery *v.* Hersey, 4 Me. 407.

7 The Aberfoyle, Abb. Adm. 251; The Volunteer, 1 Sum. 551; Donahoe *v.* Kettell, 1 Cliff. 139; Gracie *v.* Palmer, 8 Wheat. 605; Webb *v.* Peirce, 1 Curt. 104; Clarkson *v.* Edes, 4 Cowen, 470; Taggard *v.* Loring, 16 Mass. 336; Raymond *v.* Tyson, 17 How. 53; Pickman *v.* Woods, 3 Mass. 481; Vallejo *v.* Wheeler, Cowp. 143; Holmes *v.* Pavenstedt, 5 Sand. 100; Perkins *v.* Hill, 2 Wood. & M. 162.

8 Donahoe *v.* Kettell, 1 Cliff. 139; Certain Logs of Mahogany, 2 Sum. 597; Webb *v.* Peirce, 1 Curt. 104; Taggard *v.* Loring, 16 Mass. 336; The Aberfoyle, Abb. Adm. 251; Gracie *v.* Palmer, 8 Wheat. 605; Clarkson *v.* Edes, 4 Cowen, 470; Raymond *v.* Tyson, 17 How. 53; Pickman *v.* Woods, 3 Mass. 481; Vallejo *v.* Wheeler, Cowp. 143; Holmes *v.* Pavenstedt, 5 Sand. 100; Perkins *v.* Hill, 2 Wood. & M. 162.

9 Richardson *v.* Winsor, 3 Cliff. 401; The Volunteer, 1 Sum. 566; The Aberfoyle, Abb. Adm. 251; Drinkwater *v.* The Spartan, 1 Ware, 160; Colvin *v.* Newberry, 8 Barn. & C. 166.

10 Drinkwater *v.* The Spartan, 1 Ware, 157; Donahoe *v.* Kettell, 1 Cliff. 139; Gracie *v.* Palmer, 8 Wheat. 605; Trinity House *v.* Clark, 4 Maule & S. 288; Eames *v.* Cavaroc, Newb. 590, distinguishing Colvin *v.* Newberry, 1 Clark & F. 283.

11 Richardson *v.* Winsor, 3 Cliff. 406; The Phœbe, 1 Ware, 266; Emery *v.* Hersey, 4 Me. 407; Mott *v.* Ruckman, 3 Blatchf. 73; Webb *v.* Peirce, 1 Curt. 104; Donahoe *v.* Kettell, 1 Cliff. 138; Reed *v.* U. S. 11 Wall. 601; Sherman *v.* Fream, 30 Barb. 478; Campbell *v.* Perkins, 8 N. Y. 430; Reeve *v.* Davis, 1 Adol. & E. 312; Frazer *v.* Marsh, 13 East, 238.

12 Drinkwater *v.* The Spartan, 1 Ware, 157; Trinity House *v.* Clark, 4 Maule & S. 288; Hutton *v.* Bragg, 7 Taunt. 14; 2 Marsh. 339; Palmer *v.* Gracie, 4 Wash. C. C. 118; Webb *v.* Peirce, 1 Curt. 106; Kleine *v.* Catara, 2 Gall. 61.

13 Arthur *v.* The Cassius, 2 Story, 93, doubting Taggard *v.* Loring, 16 Mass. 336. And see MASTER, § 134.

14 Thomas *v.* Osborn, 19 How. 30; Webb *v.* Peirce, 1 Curt. 104; Perry *v.* Osborne, 1 Curt. 107; Cutler *v.* Winsor, 6 Pick. 335; Winsor *v.* Cutts, 7 Me. 261; Sprat *v.* Donnell, 26 Me. 185; Taggard *v.* Loring, 16 Mass. 336; Thompson *v.* Hamilton, 12 Pick. 425; Manter *v.* Holmes, 10 Met. 402; Thompson *v.* Snow, 4 Me. 264.

§ 206. Vessel let on shares. — Where the master takes a contract of the vessel, and directs her employment, the earnings to be divided between him and the owners, it is a lease or charter of the vessel, and the general owners are not liable on his contract for supplies furnished to the vessel while thus employed.[1] The owners do not thereby become jointly liable.[2] In victualling and manning the vessel, he acts on his own account, and not as agent of the owners.[3] He is deemed owner *pro hac vice*, and is alone responsible for supplies,[4] and for "small generals."[5] Sailing the vessel on shares, hiring the crew, paying and victualling them, paying half port charges, and paying over to the owners one-half of the freight, constitute one of several owners owner for the voyage.[6] Where the master chartered the vessel for a specific sum, and agreed to furnish her with all requisite stores, he, and not the owners, is exclusively responsible for supplies;[7] whether he is liable for repairs depends on usage.[8] A personal agreement for a common enterprise and division of profits is not a charter party giving a lien on the vessel.[9]

1 Skolfield *v.* Potter, 2 Ware, 395; Thompson *v.* Hamilton, 12 Pick. 425; Taggard *v.* Loring, 16 Mass. 336; Emery *v.* Hersey, 4 Me. 407; Cutler *v.* Thurlo, 20 Me. 213; Thompson *v.* Snow, 4 Me. 264; Cutler *v.* Winsor, 6 Pick. 335; The Crusader, 1 Ware, 441. See MASTER, § 134.

2 The Phœbe, 1 Ware, 266; Reynolds *v.* Toppan, 15 Mass. 370; Taggard *v.* Loring, 16 Mass. 336.

3 Fox *v.* Holt, 4 Ben. 290; Webb *v.* Peirce, 1 Curt. 104; Mayo *v.* Snow, 2 Curt. 102.

4 Kenzell *v.* Kirk, 37 Barb. 113.

5 Mayo *v.* Snow, 2 Curt. 103; Webb *v.* Peirce, 1 Curt. 104, reversing S. C. 1 Sprague, 192.

6 Thomas *v.* Osborn, 19 How. 22; Hallet *v.* Columbian Ins. Co. 8 Johns. 272; Thorp *v.* Hammond, 12 Wall. 416; Webb *v.* Peirce, 1 Curt. 104; S. C. 1 Sprague, 192. And see Rev. Stats. sec. 4286.

7 Mott *v.* Ruckman, 3 Blatchf. 171; Skolfield *v.* Potter, 2 Ware, 395; Frazer *v.* Marsh, 13 East, 238; Thompson *v.* Snow, 4 Me. 264; The Larch, 2 Curt. 434; Webb *v.* Peirce, 1 Curt. 104.

8 Packard *v.* The Louisa, 2 Wood. & M. 55; The Seaside, 2 Sum. 567; The George, 1 Sum. 151, 591.

9 Vandewater *v.* The Yankee Blade, 1 McAll. 9.

§ 207. Charter to government.—Where the contract warranted the vessel to be kept seaworthy, and she became unseaworthy by the action of sea worms incident to southern waters, the owner cannot recover for her loss by this cause.[1] Where the terms of the contract are that the owners shall keep the vessel "tight, staunch, etc., fit for merchant service," they cannot recover for service while laid up for repairs.[2] Where the contract was for a per

diem compensation, the Government is not the owner for the voyage, and is not liable for the expenses of the pilot and crew sent to her assistance.[3] Where the quartermaster-general ordered the price fixed by the contract to be reduced, and the owner allowed her to remain in the service of the Government, he is concluded by his acquiescence in the reduction in the price.[4] When payment is to be made by the day until discharged by the charterer, a retroactive order of discharge will not deprive the owners of their rights to the charter money.[5] It is the duty of the Government to notify of the discharge, and till notice the owners are entitled to payment for the hire.[6] The owners are entitled to extra freight for conveyance of goods beyond the point agreed on.[7] Where the loss of service was due to the neglect of duty of the quartermaster, the owners may recover to the time of the actual discharge.[8] Where the appropriation to the use of the Government was made, not by the right of eminent domain, nor by military law, but by virtue of an option to purchase the vessel reserved in the charter party, an award of the second auditor, in case of her loss, is not conclusive on the owners.[9] Where the vessel was injured in the Government service, by a forced employment beyond her capacity, the Government was held liable for the damage.[10] The Government is not liable for demurrage for detention on the return trip after the discharge of the vessel under the terms of the contract.[11]

1 Pratt *v.* U. S. 3 Ct. Cl. 105.

2 White *v.* U. S. 11 Ct. Cl. 578; Reed *v.* U. S. 11 Wall. 591; Hawkins *v.* Turzell, 5 El. & B. 883.

3 Reed *v.* U. S. 11 Wall. 591.

4 Emery *v.* U. S. 4 Ct. Cl. 401; Clyde *v.* U. S. 5 Ct. Cl. 134; Cobb *v.* U. S. 5 Ct. Cl. 176; Martin *v.* U. S. 5 Ct. Cl. 214; Crary *v.* U. S. 5 Ct. Cl. 231; Thorne *v.* U. S. 5 Ct. Cl. 242.

5 Leary *v.* U. S. 9 Ct. Cl. 233.

6 Smith *v.* U. S. 9 Ct. Cl. 237.

7 Swain *v.* U. S. 2 Dev. 35.

8 Fogg *v.* U. S. 5 Ct. Cl. 264.

9 Bogert *v.* U. S. 3 Ct. Cl. 18; Conrad *v.* U. S. Id. 89.

10 Shultz *v.* U. S. 3 Ct. Cl. 56; Morgan *v.* U. S. 5 Ct. Cl. 182; Leary *v.* U. S. Id. 234.

11 Claim of Clarke & Co. 4 Opin. Att.-Gen. 83.

§ 208. Liability for loss.—Where the Government insures in a charter party against the "war risks," and the vessel is driven ashore by a gale, and captured by the enemy, the acts of the enemy constitute the proximate cause of loss.[1] Where the owners assumed the marine

risks, and the loss was occasioned by a marine risk, the owners must bear the loss,[2] as where the vessel is wrecked by a collision,[3] or by ice in the river.[4] Where the Government assumed the war risk, and the contract fixed an appraised value on the vessel, and the vessel was destroyed, the Government was liable only for the balance of the appraised value over the expenses, repairs, and the agreed profit.[5] Where the Government assumes the "war and all other risks," damages for an injury by running against ships in a river, without the fault of the master and crew, may be recovered.[6] If the vessel is lost through the negligence or carelessness of the employees of her owners, the Government is not liable; otherwise if lost through the negligence of officers or agents of the Government.[7] Where the owners assumed the marine and fire risks, and the Government all other risks, and the vessel was burned, the owners are entitled to remuneration up to the time of her loss.[8] Where the owners retain possession and control of the vessel, it is a mere contract of affreightment, and the Government is not liable for her loss by fire.[9]

1 Clyde v. U. S. 9 Ct. Cl. 184; Baker v. U. S. 3 Ct. Cl. 76.

2 Reybold v. U. S. 5 Ct. Cl. 277; Flushing &c. St. F. Co. v. U. S. 6 Ct. Cl. 1; U. S. v. Kimball, 13 Wall. 636; Reed v. U. S. 11 Wall. 591.

3 Mott v. U. S. 9 Ct. Cl. 257; Goodwin v. U. S. 6 Ct. Cl. 146.

4 Reybold v. U. S. 15 Wall. 207.

5 Spear v. U. S. 5 Ct. Cl. 166; New Bedford &c. St. Prop. Co. v. U. S. 5 Ct. Cl. 270.

6 Clark v. U. S. 9 Ct. Cl. 377.

7 The Walthan, 13 Opin. Att. Gen. 119.

8 Freeman v. U. S. 3 Ct. Cl. 272.

9 Shaw v. U. S. 93 U. S. 235, affirming S. C. 9 Ct. Cl. 388.

§ 209. Obligations of parties. — It is immaterial that the charter party was executed subsequent to its date, when the services began on that date.[1] Where the conditions of the contract are illegal, it is void, but if the illegality was not known to the parties, subsequent obligations growing out of it would be binding.[2] Where the owner of a vessel employed a tow-boat, which is lashed alongside for towage purposes, the obligations of the hirer in case of loss or injury to tow while in the service is determined accordingly.[3] Under a contract simply giving the use and disposal of the vessel, the owners are not bound, in the absence of proof of usage or custom, to alter materially the construction of the vessel.[4] Where the charterers were to have control of the vessel, and the owners were to nominate and the charterers to appoint and

pay the chief engineer and captain, the owners were bound to keep the boiler in good condition, and were in possession for that purpose.[5] Where a charterer absolutely refused to receive the vessel the owners are not bound to keep her in readiness.[6] Where the vessel becomes disabled by accident while loading, the freighter will not be bound by the charter unless she is repaired and rendered fit in a reasonable time.[7] The positive refusal to furnish a cargo dispenses with the obligation of waiting to receive it.[8] The owner under a charter party is only a bailee for hire, and as such is bound to the use of only ordinary skill and care.[9]

1 Bowley v. U. S. 8 Ct. Cl. 139.

2 Wilson v. Le Roy, 1 Brock. 447.

3 Reeves v. The Constitution, Gilp. 579.

4 Beecher v. Bechtel, 3 Blatchf. 40.

5 The Francis Wright, 7 Ben. 88.

6 Baetjer v Bors, 7 Ben. 280.

7 Purvis v. Tunno, 1 Brev. 259; S. C. 2 Amer. Dec. 664.

8 Hall v. Hurlbut, Taney, 598, denying Avery v. Bowden, 5 Ellis & B. 714; 6 Ibid. 953; Clarke v. Crabtree, 2 Curt. 92; Kleine v. Catara, 2 Gall. 61.

9 Lamb v. Parkman, 1 Sprague, 343.

§ 210. Obligations imperative. — The performance of the conditions of a charter party is imperative.[1] If what is agreed to be done is possible or lawful, it must be done,[2] and performance is not excused by accident.[3] No exceptions of a private nature, not contained in the contract itself, can be engrafted by implication as an excuse for non-performance.[4] A blockade of the port of destination dissolves the charter party;[5] but capture merely suspends it.[6] So, embargo merely suspends it.[7] Where the language of the contract is absolute, performance is not dispensed with by the subsequent change in military operations.[8] Where the charter party contained an exception in regard to the restraints of rulers and princes, it operates as an excuse only for the ship-owner, and in the absence of such a stipulation, the owner is bound to receive on board the return cargo, even though prohibited by the authorities.[9] Where performance was to be as soon as the upper lakes were navigable, a temporary obstruction suspends the contract.[10] A deviation from the voyage is not excused by reason of insufficiency of crew, caused by sickness and desertion.[11] When the charterer is on board, and consents, a deviation will not annul the contract.[12] So of a deviation made with the consent of the consignee.[13]

1 Kilbourne v. State Sav. Inst. of St. Louis, 22 How. 502; Spence v. Chodwick, 10 Q. B. 517; Hudson Canal Co. v. Penn. C. Co. 3 Wall. 289; Randall v. Lynch, 12 East, 179.

2 The Harriman, 9 Wall. 177; Touteng v. Hubbard, 2 Bos. & P. 291; Odlin v. Ins. Co. of Va. 2 Wash. C. C. 319.

3 Holyoke v. Depew, 2 Ben. 341; Spence v. Chodwick, 10 Q. B. 517; Touteng v. Hubbard, 3 Bos. & P. 291; Blight v. Page, 3 Bos. & P. 295; Hadley v. Clarke, 8 Term Rep. 259; Mediros v. Hill, 8 Bing. 231.

4 Howland v. Greenway, 22 How. 502; Atkinson v. Ritchie, 10 East, 530.

5 Scott v. Libby, 2 Johns. 336; S. C. 3 Amer. Dec. 431; The Harriman, 9 Wall. 174; Lorillard v. Palmer, 15 Johns. 14. The act of sailing with intent to violate blockade is in itself illegal—The Admiral, 3 Wall. 615; Mediros v. Hill, 8 Bing. 231. And see PRIZE.

6 Bork v. Norton, 2 McLean, 427; Havelock v. Geddes, 10 East, 555.

7 Odlin v. Ins. Co. of Penn. 2 Wash. C. C. 319; Hawley v. Clark, 8 Term Rep. 259; Bork v. Norton, 2 McLean, 428.

8 The Harriman, 9 Wall. 161; Mediros v. Hill, 8 Bing. 231.

9 Holyoke v. Depew, 2 Ben. 342; Bruce v. Nicolopulo, 24 Law J. N. S. 221; Blight v. Page, 3 Bos. & P. 295; Sjoerds v. Luscombe, 16 East, 201; Brooks v. Minturn, 1 Cal. 484; Duff v. Lawrence, 3 Johns. Cas. 164; Ogden v. Graham, 31 Law J. N. S. 26; Spencer v. Chodwick, 10 Q. B. 517; Touteng v. Hubbard, 3 Bos. & P. 291. But see Morgan v. Ins. Co. of N. A. 4 Dall. 445.

10 The Nathaniel Hooper, 3 Sum. 542; S. C. 2 Law Rep. 133.

11 The Ethel, 5 Ben. 154.

12 Mason v. The Blaireau, 2 Cranch. 240.

13 Thatcher v. McCulloh, Olcott, 365.

§ 211. Rights of owners.—Where the covenant is to proceed to a foreign port and there take on a cargo, and the charterer declined to put a cargo on board, the owner may engage in another voyage, and freight to be earned cannot be claimed by the charterer.[1] If charterer at a foreign port is unable or unwilling to load the ship, the master may take a cargo from others, and the owners will have a lien for the freight agreed upon; and if the master stipulates for freight free, the owner has his remedy on the charter party.[2] If the vessel wastes time in intermediate voyage, or at an intermediate port, the owners cannot complain of a failure of shippers to furnish the cargo;[3] and when the return cargo is not ready at the appointed time, both parties are absolved from their contract.[4] The owner may recover damages for prohibited articles put on board which caused a seizure of the vessel.[5]

1 Kleine v. Catara, 2 Gall. 74; Havelock v. Geddes, 10 East, 555; Jameson v. Laurie, cited in Abb. on Sh. 188; Puller v. Halliday, 12 East, 494; Palmer v. Gracie, 4 Wash. C. C. 124; Hyde v. Wallis, 3 Camp. 202.

2 Palmer v. Gracie, 4 Wash. C. C. 124; Hyde v. Wallis, 3 Camp. 202; Paul v. Birch, 2 Atk. 621; Hogsheads of Molasses, 4 Blatchf. 322; Heckscher v. McCrea, 24 Wend. 304. And see FREIGHT.

3 Hall v. Hurlburt, Taney, 589.

4 Kleine v. Catara, 2 Gall. 75; Robertson v. Bethune, 3 Johns. 342.

5 Sparks v. West, 1 Wash. C. C. 238; U. S. v. Chenowith, 6 McLean, 189.

§ 212. Rights of charterers.—The charterer may substitute a sound cargo for one damaged before the sailing of the vessel, and it is the duty of the master to receive it.[1] Where the owners agreed to take on all lawful goods and merchandise, the charterers were not restricted to any kind of cargo.[2] The charterers are entitled to a deduction for peculiar damage for not being allowed to send the quantity of merchandise not taken, and which ought to have been taken;[3] so they have a remedy in damages for a short delivery,[4] and on non-delivery.[5] In determining the respective shares of parties to an agreement for the employment of a vessel expired before her return, her value must be determined by her value at the time of her arrival.[6] The charterer's right to the possession of the vessel is lost by a voluntary surrender to the owner.[7]

1 The Cargo of The Lutekin, 6 Ben. 565.

2 Freeman v. A Cargo of Salt, 40 Hunt's Mer. Mag. 457.

3 Weston v. Minot, 3 Wood. & M. 443; Bornmann v. Tooke, 1 Camp. 376; Dunbar v. Buck, 6 Munf. 34.

4 Ritchie v. Atkinson, 10 East, 295.

5 The Panama, Olcott, 363; The Volunteer, 1 Sum. 551.

6 Foster v. Goddard, 1 Cliff. 158.

7 Bergen v. The Tamerend, 40 Hunt's Mer. Mag. 708.

§ 213. Rights, duties, and obligations of master. The master may refuse goods, if, in his honest judgment, they are in a condition or of a character that they cannot be carried without injury to the cargo;[1] he may disregard the stipulations as to freights above deck, but compensation may be decreed for the loss of space.[2] A master may keep a larger quantity of ballast than the charter party allows.[3] Where the contract stipulated for certain articles for ballast, it is the duty of the carrier to receive such as the charterers offer.[4] If he neglects necessary preparations and in consequence is obliged to take on stone as ballast, the loss must fall on the owners.[5] Where the master retains part of the vessel, he is entitled to the freight,[6] and where he takes the vessel on a "lay" he must pay a reasonable freight for the carriage of his own cargo.[7] Where the owner under a charter party was entitled to the cabin, the master is liable for the use of one of the state-rooms, even though it would have remained empty.[8] He is liable for the passage-money of a passen-

ger carried by him, although he never received it.[9] The master takes on himself the risks and delays incident to a method of unloading according to a custom of the port.[10]

1 Boyd v. Moses, 7 Wall. 316.

2 Reynolds v. The Joseph, 2 Hughes, 58.

3 Reynolds v. The Joseph, 2 Hughes, 58.

4 Rich v. Parrot, 1 Sprague, 358.

5 Rich v. Parrot, 1 Sprague, 358.

6 Perkins v. Hill, 2 Wood. & M. 162; The Volunteer, 1 Sum. 551.

7 Thomas v. Osborn, 19 How. 31; Gracie v. Palmer, 8 Wheat. 605.

8 Winsor v. Sampson, 1 Sprague, 548.

9 Rennell v. Kimball, 5 Allen, 356.

10 The Glover, 1 Brown Adm. 166; Towle v. Kettell, 5 Cush. 18.

§ 214. Liability of parties.—Where the charter party is a mere contract of affreightment, the owners are common carriers, and will, in general, be responsible for failure to convey the goods.[1] The owners are responsible for loss by defects in the vessel, whether latent or visible, known or unknown.[2] They are not responsible for loss or damage occasioned by the fault of the charterer, by the act of God, or of the public enemy, or some cause excepted in the contract,[3] unless chargeable with neglect or fault.[4] They are responsible for the qualifications of the master selected by them,[5] but they are not liable for barratry of master and crew beyond the sum mentioned in the charter party.[6] Damage sustained in consequence of the vessel being obliged to perform quarantine should be borne by the owner of the vessel.[7] Where the charterers were ready to receive the cargo, but the master did not arrive till two days after the time, the charterers are not liable for extra expenses in unloading.[8] Where other goods than those contracted for were substituted, and received by the master under protest, with additional claim for freight, the hirer was held liable for such additional freight.[9] Where damage is caused by an explosion, only defects, hidden and unknown at the date of the contract, will discharge him from liability.[10] Where goods are landed at the wrong place during the master's illness by the mate, at the request of the supercargo, agent of the charterers, the latter must bear the expense.[11] A special agent of the charterer is not authorized to charge expenses, advances, and liabilities against the owner on an implied obligation to him.[12] If the consignee was cognizant of the conditions of the charter party, his advances are deemed chargeable to the charterer.[13]

1 Richardson v. Winsor, 3 Cliff. 491; The Volunteer, 1 Sum. 551.
2 Werk v. Leathers, 1 Woods, 273; Putnam v. Wood, 3 Mass. 485.
3 Richardson v. Winsor, 3 Cliff. 401; The Niagara, 21 How. 23.
4 The Casco, 4 Law Rep. 471.
5 Dutton v. The Tug Express, 3 Cliff. 462.
6 Campbell v. The Alknomac, Bee, 124.
7 Holyoke v. Depew, 2 Ben. 342; Duff v. Lawrence, 3 Johns. Cas. 164.
8 The Mary E. Taber, 1 Ben. 108; Blossom v. Smith, 3 Blatchf. 316.
9 Pieces of Lumber, 7 Ben. 389.
10 Stewart v. Western Union R. R. Co. 4 Biss. 362.
11 Weston v. Minot, 3 Wood. & M. 436.
12 The Joseph Cunard, Olcott, 120.
13 Many v. Watts, 15 La. An. 430.

§ 215. Liability for delay.—A carrier is not responsible for the consequences of delay in a voyage, if not attributable to his fault or negligence, as in case of boisterous weather, adverse winds, or low tides.[1] A forcible detention will excuse from the performance of an obligation created by law.[2] Where there is no stipulation that the vessel will arrive at or before a particular day, the shipper takes the risk of delay or detention by any superior force which the vessel could not resist or overcome.[3] The usual time of a voyage is not a circumstance which of itself imports culpable negligence or want of skill or competency in a crew which occupies nearly double the usual time in making it.[4] A charter on time at a specified rate creates an obligation on the vessel to sail without delay, and proceed with all reasonable dispatch.[5] Unusual difficulty in obtaining a master and crew does not excuse from performance of the contract.[6] Where the vessel was frozen in and the captain died, the owner is entitled to indulgence to procure a new master and await relief of the vessel;[7] but if the owner repudiates the agreement, the vessel must bear the consequences of non-performance of contract.[8] Where the delay ensues from unforeseen causes, the charterer is entitled to damages as compensation for the injury he may sustain.[9] So for delay occasioned by the master in passing a port,[10] or for not having her sails in proper condition, whereby the voyage was delayed.[11]

1 Clark v. Barnwell, 12 How. 272; Boyle v. McLaughlin, 4 Harr. & J. 291.

2 The Onrust, 6 Blatchf. 536; Wilbert v. N. Y. & E. R. R. Co. 12 N. Y. 245; S. C. 19 Barb. 36; Harmony v. Bingham, 1 Duer, 209; Parsons v. Hardy, 14 Wend. 215; Conger v. Hudson Riv. R. R. Co. 6 Duer, 375; Coombs v. Nolan, 7 Ben. 303; Cross v. Beard, 26 N. Y. 85; Ford v. Cotesworth, Law Rep. 4 Q. B. 127.

3 Hall v. Hurlbut, Taney, 597; Hurst v. Usborne, 18 Com. B. 144; Schilizzi v. Derry, 4 El. & B. 873; Hadley v. Clark, 8 Term Rep. 259.

4 The Gentleman, Olcott, 110.

5 The Success, 7 Blatchf. 551.

6 The Eliza, 2 Ware, (Dav.) 316.

7 The Flash, Abb. Adm. 119; The Aberfoyle, Abb. Adm. 256; The Williams, 1 Brown Adm. 220; The Edwin, 1 Sprague, 482; Bowman v. Teall, 14 Wend. 215; Parsons v. Hardy, 14 Wend. 215.

8 The Flash, Abb. Adm. 119.

9 Fearing v. Cheeseman, 3 Cliff. 97; Freeman v. Taylor, 8 Bing. 124; Clipsham v. Vertue, 5 Q. B. 265; Seeger v. Duthie, 8 Com. B. N. S. 45; Tarrabochia v. Hickie, 1 Exch. 183; Dinech v. Cortlett, 12 Moore P. C. 199.

10 Stokely v. Smith, 2 Ben. 407.

11 The Thomas Jefferson, 3 Ben. 302.

§ 216. Damages for breach of contract. — If the master or owner refuses to perform the contract, the charterer has no privilege or maritime lien, but must resort to his personal action for damages.[1] The owners are bound to make compensation on non-performance of the contract for actual damage only.[2] Where the master violates a contract restricting the cargo, the vessel is liable for any loss which may afterward occur.[3] The vessel is liable for freight not earned by a willful failure of performance of the contract.[4] Unless the non-performance goes to the whole root and consideration of the contract, the covenant broken is not considered a condition precedent, but a distinct covenant, for breach of which the party injured may be compensated in damages;[5] so, carrying the whole cargo for the whole voyage is a condition precedent, if in its nature it precedes what is to be done, or is the root of it.[6] "To sail with the first convoy," or "with the first favorable wind," is not a condition precedent, but a distinct covenant, for breach of which the owners are liable in damages.[7] Where the master put into a port different from the port of destination, and refused to deliver the cargo there or carry it to its destination, it is a clear breach of duty.[8] Where the whole consideration for any stipulation fails, or where a stipulation becomes incapable of performance by the voluntary act of a party, the other party is at liberty to decline performance;[9] but a contract is not broken by a party furnishing all he has, though the contract calls for more.[10] If the vessel is seized and detained by the Government, it is a sufficient excuse for non-performance of the contract.[11] The measure of damages for which the owners are liable for breaking up the voyage is the actual loss and expenses incurred, and labor and services in procuring another vessel, and reasonable

disbursements in the action, and taxed costs.[12] For failure to sail at the proper time, or for delay in delivery, is the difference between the fair market price at the port of destination on the day it ought to arrive and the time it did actually arrive.[13] The charterer is liable for injury received going to a place contrary to the terms of the charter party.[14]

1 The General Sheridan, 2 Ben. 296; Reed v. The Telos, not reported, and Torrices v. The Winged Racer, not reported; Thatcher v. McCulloh, Olcott, 371; Bornmann v. Tooke, 1 Camp. 376. But see The Panama, Olcott, 343.

2 Harrison v. Stewart, Taney, 485.

3 Knox v. The Ninetta, Crabbe, 534.

4 The Zenobia, Abb. Adm. 52; Watson v. Duykinck, 3 Johns. 335.

5 Bangs v. Lowber, 2 Cliff. 165; S. C. 2 Wall. 749; Davidson v. Gwynne, 12 East, 381; Seegar v. Duthie, 8 Com. B. N. S. 45; Havelock v. Geddes, 10 East, 555.

6 Weston v. Minot, 3 Wood. & M. 442; Havelock v. Geddes, 10 East, 555; Post v. Robertson, 1 Johns. 24; Bornmann v. Tooke, 1 Camp. 376.

7 Lowber v. Bangs, 2 Wall. 749; S. C. 2 Cliff. 165; Davidson v. Gwynne, 12 East, 381; Boone v. Eyre, 2 W. Black. 1312.

8 The Maggie Hammond, 9 Wall. 455, questioning The St. Cloud, Brown. & L. 14.

9 Kleine v. Catara, 2 Gall. 61; Puller v. Halliday, 12 East, 494.

10 Robinson v. Noble, 8 Pet. 181.

11 The Onrust, 6 Blatchf. 533.

12 The Tribune, 3 Sum. 144.

13 Page v. Munro, 1 Holmes, 233; The Success, 7 Blatchf. 551.

14 Latson v. Sturm, 2 Ben. 327.

12 Nine Hundred and Seventy-Nine Boxes of Sugar, 7 Ben. 242.

13 Pendall v. Rench, 4 McLean, 259.

14 Goodrich v. Norris, Abb. Adm. 196, 199; Berkley v. Watling, 7 Adol. & E. 29; Bates v. Todd, 1 Wood. & R. 106.

15 Jones v. Bradner, 10 Barb. 193; Mercantile Mu. Ins. Co. v. Chase, 1 E. D. Smith, 115; Keyser v. Harbeck, 3 Duer, 373; Hawes v. Watson, 2 Barn. & C. 540; Ruck v. Hatfield, 5 Barn. & Ald. 632; Gosling v. Bernie, 7 Bing. 339; Thompson v. Small, 1 Com. B. 328; Evans v. Nichol, 4 Man. & G. 614; Bryans v. Mix, 4 Mees. & W. 775; Craven v. Ryder, 6 Taunt. 434.

16 The M. K. Rawley, 21 Int. Rev. Rec. 49.

§ 219. Operation and effect of.—The bill of lading operates from the time of delivery,[1] and includes goods delivered on the wharf, though not on board when the bill was signed.[2] The bill delivered to the shipper controls; the "ship's bill" is designed only for the convenience of the master.[3] If two bills of lading for the same goods be given to different parties, it creates a double liability;[4] the liability continues until all the bills of lading are given up and canceled.[5] Where the owner successfully repudiates a bill of lading, he cannot set it up as merging a prior contract.[6] Where the bill of lading was signed before the goods were delivered on board, but were delivered on the wharf, or to the agent of the carrier, it will operate as between the shipper and the carrier by way of relation and estoppel.[7] The bill of lading manifests the intention of the parties to have the carrier hold the property for, and deliver it to, the factor.[8] It is construed as an entire contract,[9] and is governed by the laws of the country to which the vessel belongs.[10] Where there was no express promise or condition for the payment of freight, it is taken as evidence of property to be forwarded to the consignee.[11]

1 The Idaho, 11 Blatchf. 221; S. C. 5 Ben. 282; Johnson v. Peck, 1 Wood. & M. 316; Castle v. Bullard, 23 How. 186; Rowley v. Bigelow, 12 Pick. 307; Halliday v. Hamilton, 11 Wall. 565.

2 The Delaware, 14 Wall. 601; Rowley v. Bigelow, 12 Pick. 307; The Eddy, 5 Wall. 481.

3 The Thames, 14 Wall. 98.

4 Stille v. Traverse, 3 Wash. C. C. 43.

5 The Matilda A. Lewis, 5 Blatchf. 520.

6 The Edwin, 1 Sprague, 477; S. C. 24 How. 386.

7 The Delaware, 14 Wall. 601; The Eddy, 5 Wall. 481; Rowley v. Bigelow, 12 Pick. 307.

8 Nesmith v. Dyeing B. & C. Co. 1 Curt. 135; Gibson v. Stevens, 8 How. 384; Grove v. Gilmer, 8 How. 429; Haille v. Smith, 1 Bos. & P. 563; Anderson v. Clarke, 2 Bing. 20; Desha v. Pope, 6 Ala. 690.

9 The Edwin v. Naumkeag S. C. Co. 1 Cliff. 326; Sayward v. Stevens, 3 Gray, 97.

10 The Avon, 1 Brown Adm. 175, 190; Pope v. Nickerson, 3 Story, 465.

11 Perkins v. Hill, 2 Wood. & M. 158; S. C. 1 Sprague, 123.

ticular trade may be stowed on deck,[8] though usage is not to control unless established by clear and satisfactory proof.[9] Where there is a well-known usage in reference to a particular trade to carry the goods as convenience may require, either upon or under deck, the bill of lading may import no more than that the cargo shall be carried in the usual manner.[10] The assent to deck stowage will be presumed, where the course of trade is governed by usage.[11] Merchandise carried under a bill of lading and paying freight is cargo and not dunnage.[12] Under an ordinary bill of lading the burden is on the owner to prove that the shipper agreed that the goods might be carried on deck.[13] Where the shipper consents to deck stowage, no loss by jettison can be claimed, unless by an accident which would have been equally fatal in case of stowage under deck.[14]

1 The Delaware, 14 Wall. 605; Creery v. Holly, 14 Wend. 28; Falkner v. Earle, 3 Best & Smith, 360; Waring v. Morse, 7 Ala. 343; Smith v. Wright, 1 Caines, 43; Gould v. Oliver, 4 Bing. N. C. 142; The Peytona, 2 Curt. 21; Stinson v. Wyman, 2 Ware, (Dav.) 174; The Wellington, 1 Biss. 282; Knox v. The Vinetta, Crabbe, 534; Anglo-African Co. v. Lamzed, Law Rep. 1 C. P. 229; The Reeside, 2 Sum. 567; Sandeman v. Scurr, Law Rep. 2 Q. B. 86; Alston v. Herring, 11 Exch. 822; Swainston v. Garrick, 2 Law J. N. S. Exch. 255; The Waldo, 2 Ware, (Dav.) 161; The Rebecca, 1 Ware, 188.

2 The Peytona, 2 Curt. 21; The Waldo, 2 Ware, (Dav.) 161; 4 Law Rep. 382; Vernard v. Hudson, 3 Sum. 405.

3 The Rebecca, 1 Ware, 188; The Delaware, 14 Wall. 606; Barber v. Brace, 3 Conn. 9; The Reeside, 2 Sum. 567; The Waldo, 2 Ware, 161; Blackett v. Royal Exch. Assu. Co. 2 Cromp. & J. 244; Lenox v. United Ins. Co. 3 Johns. Cas. 178.

4 The Wellington, 1 Biss. 281; Creery v. Holly, 14 Wend. 28; The Delaware, 14 Wall. 600, questioning The St. Cloud, Brown & L. 14. And see Clark v. Barnwell, 12 How. 272; Sayward v. Stevens, 3 Gray, 97.

5 The Water Witch, 1 Black, 494.

6 The Star of Hope, 2 Sawy. 15.

7 Bradshaw v. Heran, Abb. Adm. 211; Gracie v. Mar. Ins. Co. 8 Cranch, 57; The Delaware, 14 Wall. 606; Clark v. Barnwell, 12 How. 272; 1 Low. 222; Wayne v. The Pike, 16 Ohio, 421; The Waldo, 2 Ware, 161; Broadwell v. Butler, Newb. 175; Sproat v. Donnell, 26 Me. 185; The Wellington, 1 Biss. 281; Leland v. Parkman, 10 Law Rep. N. S. 186. *Contra*, Vernard v. Hudson, 3 Sum. 405.

8 The Delaware, 14 Wall. 606; The Wellington, 1 Biss. 281; Barber v. Brace, 3 Conn. 9; The Reeside, 2 Sum. 567; The Waldo, 2 Ware, (Dav.) 161; 4 Law Rep. 382; Chubb v. Bushels of Oats, 16 Law Rep. N. S. 492.

9 Broadwell v. Butler, 6 McLean, 301; S. C. Newb. 175; Wayne v. The Pike, 16 Ohio, 421; The Reeside, 2 Sum. 567; The Delaware, 14 Wall. 606; Barber v. Brace, 3 Conn. 9.

10 The Delaware, 14 Wall. 606; Lapham v. Atlas Ins. Co. 24 Pick. 1; Sproat v. Donnell, 26 Me. 185; Hope v. State Bank, 4 La. 212; Chubb v. Bushels of Oats, 16 Law Rep. N. S. 492.

11 The Invincible, 1 Low. 223; Clark v. Barnwell, 12 How. 272.

12 Insurance Co. v. Thwing, 13 Wall. 672.

13 The Peytona, 2 Curt. 21.

14 The Wellington, 1 Biss. 280; Lawrence v. Minturn, 17 How. 100; The Waldo, 2 Ware (Dav.) 161; The Delaware, 14 Wall. 604; The Peytona, 2 Curt. 21; Smith v. Wright, 1 Caines, 43; Taunton Cop. Co. v. Merchants' Ins. Co. 22 Pick. 108; The Rebecca, 1 Ware, 188; Dodge v. Bartol, 5 Me. 286; Adams v. Warren Ins. Co. 22 Pick. 163; Milward v. Hibbert, 3 Q. B. 120; Shackleford v. Wilcox, 9 La. 33. See CARRIER, § 253.

§ 222. Stipulations in.—A stipulation, to vary the law merchant, must be in writing.[1] A bill of lading giving "privileges of lightering and reshipping" makes it the duty of the carrier to reship during the voyage according as interest or convenience may advise,[2] but the privilege cannot be exercised before the voyage is commenced.[3] The words "privilege of reshipping" are intended for the benefit of the carrier, but do not limit his responsibility.[4] The words "personal goods" on the margin, do not exempt the shipper from freight, nor the carrier from liability.[5] A special contract stamped upon a bill of lading is not so certain and specific as is required to free the carrier from liability.[6] A marginal note or figures in the margin is not a part of the contract.[7]

1 Brittan v. Barnaby, 21 How. 527.

2 Dorris v. Copelin, 5 Amer. Law. Reg. N. S. 492; Broadwell v. Butler, 6 McLean, 296; Newb. 171; Hatchett v. The Compromise, 12 La. An. 785; Sturgess v. The Columbus, 23 Mo. 230.

3 Dorris v. Copelin, 5 Amer. Law Reg. N. S. 492; McGregor v. Kilgore, 6 Ohio, 358; Dunseth v. Wade, 2 Scam. 285; Wilcox v. Parmelee, 3 Sand. 610; Dalzell v. The Saxon, 10 La. An. 290; Whitesides v. Russell, 8 Watts & S. 44.

4 Broadwell v. Butler, 6 McLean, 296; Newb. 175.

5 The Elvira Harbeck, 2 Blatchf. 366.

6 The May Queen, Newb. 464; Railroad Co. v. Manuf. Co. 16 Wall. 330; McMillan v. M. S. & N. I. R. R. Co. 16 Mich. 88.

7 U. S. v. Kimball, 13 Wall. 636; The Andover, 3 Blatchf. 303. See CARRIER, § 260.

§ 223. Exceptions in. — Words of exception in an instrument are to be construed most strongly against the party for whose benefit they are introduced.[1] "Perils of the seas," "dangers of the seas," and "dangers of navigation" "incident to the navigation of the river," are convertible terms.[2] Where the bill of lading provides for stowage on deck, and excepts "the perils of the seas," the exception is to be construed with reference to the particular adventure contemplated.[3] The term "dangers of the seas" must be understood to include only such losses as are of an extraordinary nature, or arise from irresistible force or some overwhelming power which cannot be guarded against by ordinary exertions of human skill or prudence;[4] so, as to perils of navigation.[5]

"Dangers of the river" signify the natural accidents incident to that navigation.[6] The words "dangers of navigation" will excuse from loss by sudden gusts of wind[7] and by collision, where no blame is imputable to his own vessel.[8] Where the words "accidents of the sea" are used, it must be shown that the accident was not caused through the fault of the owner.[9] Common carriers are not excused from all unavoidable accidents, but such only as arise from the act of God,[10] and this must be the immediate and not the remote cause of the loss,[11] and without any act or omission of the master or crew;[12] a loss which might be avoided by foresight and prudence is not to be attributed to the "dangers of the seas." The loss must be from some cause above the control of human agencies.[13] So, a necessary jettison is within the exception of dangers of the seas,[14] but if caused by unseaworthiness, the loss is not within the exception;[15] so, a jettison rendered necessary by a fault or breach of contract of the master or owner is not a peril of the seas,[16] the sea peril must be the proximate cause of the loss.[17]

1 Palmer *v.* Warren Ins. Co. 1 Story, 364; Blackett *v.* Royal Exch. Assu. Co. 2 Cromp. & J. 244.

2 Baxter *v.* Leland, Abb. Adm. 52, 348; The Reeside, 2 Sum. 567; Fairchild *v.* Slocum, 19 Wend. 329; Aymar *v.* Astor, 6 Cow. 266; The Wathan, 13 Opin. Att. Gen. 119.

3 Lawrence *v.* Minturn, 17 How. 100.

4 The Reeside, 2 Sum. 571; The Rocket, 1 Biss. 354; Elliott *v.* Russell, 10 Johns. 1; Anthony *v.* Ætna Ins. Co. 1 Abb. U. S. 346; The Protector, 9 Wall. 687; The Niagara *v.* Cordes, 21 How. 7; Dedekam *v.* Vose, 3 Blatchf. 44; Clark *v.* Barnwell, 12 How. 272; Holladay *v.* Kennard, 12 Wall. 259; Railroad Co. *v.* Reeves, 10 Wall. 176; Dedekam *v.* Vose, 3 Blatchf. 44; McClures *v.* Hammond, 1 Bay, 99; S. C. 1 Amer. Dec. 598; New Jersey S. N. Co. *v.* Merchants' Bank, 6 How. 344; Hunt *v.* Morris, 6 Mart. 676; Dibble *v.* Morgan, 1 Woods, 411; Whitesides *v.* Russell, 8 Watts & S. 44.

5 The Portsmouth, 2 Biss. 58; The Niagara *v.* Cordes, 21 How. 7; Garrison *v.* Memphis Ins. Co. 19 How. 314; The Reeside, 2 Sum. 571; Jones *v.* Pitcher, 3 Stewt. & P. 135; Johnson *v.* Friar, 4 Yerg. 48; The Juniata Paton, 1 Amer. Law Reg. 262; The Rocket, 1 Biss. 356.

6 Williams *v.* Branson, 1 Murph. 417; S. C. 4 Amer. Dec. 562; Garrison *v.* Memphis Ins. Co. 19 How. 314; Jones *v.* Pitcher, 3 Stewt. & P. 135; Johnson *v.* Friar, 4 Yerg. 48.

7 Germania Ins. Co. *v.* The Lady Pike, 8 Amer. Law Reg. N. S. 614; Williams *v.* Branson, 1 Murph. 417; Amis *v.* Stephens, 1 Strange, 128.

8 Badgely *v.* The Juniata Paton, 1 Amer. Law Reg. 262; Clark *v.* Barnwell, 12 How. 272.

9 The Mollie Mopler, 2 Ben. 505; Bazin *v.* Richardson, 10 Law Rep. N. S. 129; S. C. 5 Amer. Law Rep. 459.

10 Dibble *v.* Morgan, 1 Woods, 407; Johnson *v.* Friar, 4 Yerg. 48; Whitesides *v.* Russell, 8 Watts & S. 44; Zenobia, 1 Abb. Adm. 92.

11 King *v.* Shepherd, 3 Story, 356; Elliott *v.* Russell, 10 Johns. 1; Jones *v.* Pitcher, 3 Stewt. & P. 135; Campbell *v.* Morse, 1 Harp. (S. C.) 468; Schieffellin *v.* Harvey, 6 Johns. 169.

12 Dibble v. Morgan, 1 Woods, 467; The Zenobia, 1 Abb. Adm. 80, 95.

13 Dibble v. Morgan, 1 Woods, 467; Johnson v. Friar, 4 Yerg. 48; Whitesides v. Russell, 8 Watts & S. 44; The Zenobia, 1 Abb. Adm. 92.

14 The Milwaukee Belle, 3 Amer. Law Tl. 65; Gillett v. Ellis, 11 Ill.; Gould v. Oliver, 4 Bing. N. C. 142; Johnson v. Crane, 1 Kerr, 356.

15 Dupont v. Vance, 19 How. 162; Steel v. State Line S. S. Co. 3 App. Cas. 72.

16 Lawrence v. Minturn, 17 How. 100; Gen. Mu. Ins. Co. v. Sherwood, 14 Ibid. 365.

17 The Portsmouth, 9 Wall. 684; Lawrence v. Minturn, 17 How. 100; King v. Shepherd, 3 Story, 356; Elliott v. Russell, 10 Johns. 1; Railroad Co. v. Reeves, 10 Wall. 190; Morrison v. Davis, 20 Pa. St. 171. See CARRIER, § 262.

§ 224. What not within exception.—A loss by collision with the pier of a bridge, in a high wind, is not a loss from the "dangers of navigation" within the terms of a bill of lading;[1] nor is damage done to cargo by stranding, on attempting to come up a bay in a dense fog, not being compelled by any exigency.[2] The breaking open of casks of liquor to lighten the vessel run aground instead of casting them overboard, under the circumstances regarded as a peril of the sea.[3] Fault by defective stowage and cooperage not a peril of the sea.[4] Desertion of seamen no peril of the sea.[5] Embezzlement is not a peril of the sea; theft and robbery are "perils" only where it is piracy.[6] Depredations committed by the passengers and crew, made necessary by the length of the voyage, are not perils of the sea.[7] Plundering by a custom-house officer having charge of the vessel is within the risks assumed by the carrier under a bill of lading.[8] Dampness or sweating shown to be the ordinary accompaniment of the voyage, and not from tempestuous weather, is not a "peril of the sea,"[9] nor damages occasioned by vermin,[10] nor by mistaking the harbor and grounding,[11] nor destruction by fire, when originating on board,[12] nor when occurring on wharf after goods landed.[13] Injury caused by water coming in through the deck and waterways, not within the exception of dangers of the seas.[14] Explosion of a boiler on a steam vessel is not a "peril of navigation,"[15] nor is a bar in a river.[16]

1 The Mohler, 21 Wall. 230.

2 The Costa Rica, 3 Sawy. 532.

3 Van Syckel v. The Thomas Ewing, Crabbe, 405.

4 The Newark, 1 Blatchf. 265.

5 The Ethel, 5 Ben. 160; The Gentleman, Olcott, 110; The Eliza, 2 Ware, (Dav.) 316.

6 King v. Shepherd, 3 Story, 349.

7 The Gold Hunter, Blatchf. & H. 300; Morse v. Slue, 1 Vent. 190; 6 Johns. 17.

8 Schieffelin v. Harvey, Anth. N. P. 76.

9 Baxter v. Leland, Abb. Adm. 348; Clark v. Barnwell, 12 How. 272.

10 The Miletus, 5 Blatchf. 335; Hazard v. The New England Mut. Ins. Co. 8 Pet. 557, reversing S. C. 1 Sum. 218; Genl. Mut. Ins. Co. v. Sherwood, 14 How. 365; Garrison v. Memphis Ins. Co. 19 How. 312; Laveroni v. Drury, 8 Ex. 166. But see Westray v. The Miletus, 2 Int. Rev. Rec. 61.

11 The Portsmouth, 9 Wall. 682.

12 Merrill v. Airey, 3 Ware, 215; S. C. 2 Curt. 8; Garrison v. Memphis Ins. Co. 19 How. 316; Turney v. Wilson, 7 Yerg. 340; New Jersey S. N. Co. v. Merchants' Bank, 6 How. 344; Hale v. N. J. S. N. Co. 15 Conn. 539; Gilmore v. Carman, 1 Smedes & M. 279; Singleton v. Hilliard, 1 Strob. Eq. 203.

13 Salmon Falls Manuf. Co. v. The Tangier, 6 Am. Law Reg. 504; S. C. 11 Law Rep. N. S. 6.

14 The Antoinetta, 3 Ben. 566; Bearse v. Ropes, 1 Sprague, 331; The Reeside, 2 Sum. 567; Hewlett v. The Antonetta C. 15 Int. Rev. Rec. 115.

15 The Mohawk, 8 Wall. 162; Bulkley v. The Naumkeag S. C. Co. 24 How. 386; 1 Cliff. 322; The Edwin, 1 Sprague, 477; 13 Law Rep. N. S. 198.

16 The Ocean Wave, 3 Biss. 319, distinguishing Transportation Co. v. Downer, 11 Wall. 129. See CARRIER, § 250.

§ 225. Exceptions, "loss by breakage, leakage, or rust."—This exception means from ordinary breakage or leakage,[1] and not from loss by negligence.[2] A memorandum, "not accountable for breakage," cannot excuse negligence or want of skill in stowage.[3] Where the breakage was not caused by the manner of stowage, the ship was held not liable.[4] The exemption, "not accountable for rust," does not exempt from responsibility for damage caused by improper stowage.[5] When the exception, "not accountable for leakage," is provided, proof that the leakage resulted from a latent defect establishes a presumptive excuse for non-delivery, and throws the burden of proof on the consignee to show want of skill, diligence, and attention.[6] The exemption, "from average leakage," does not cover leakage from negligence in stowing or handling the cargo; but the burden of proof of such negligence is on the shipper.[7] The printed clause, "ship not responsible for rust, shrinkage, or leakage," changes the general rule that the acknowledgment of the receipt of goods "in good order" places upon the carrier the burden of proof that he was not guilty of negligence or carelessness.[8]

1 Ohrloff v. Briscall, Law Rep. 1 P. C. 231.

2 Hunnewell v. Taber, 2 Sprague, 1; Phillips v. Clarke, 2 Com. B. N. S. 156; Carey v. Atkins, 6 Ben. 562; Nelson v. The National S. S. Co. 7 Ben. 340.

3 The David and Caroline, 5 Blatchf. 266; Nelson v. The National S. S. Co. 7 Ben. 340; Carey v. Atkins, 6 Ben. 562.

4 The Delhi, 4 Ben. 345; Carey v. Atkins, 6 Ben. 562.

5 Dedekam v. Vose, 3 Blatchf. 44; The Invincible, 3 Sawy. 176.

6 The Olbers, 3 Ben. 148.

7 The Delhi, 4 Ben. 354; Vaughan v. Casks of Sherry, 7 Ben. 509; Dedekam v. Vose, 3 Blatchf. 44; The David and Caroline, 5 Blatchf. 266.

8 The Invincible, 1 Low. 227; Czech v. General S. N. Co. Law Rep. 3 C. P. 14; New Jersey S. N. Co. v. Merchants' Bk. 6 How. 384. And see CARRIER, § 254.

§ 226. Title to property under.—The *prima facie* legal effect of a bill of lading is to vest the legal title to the property in the consignee, unless the contrary appears or is shown by extrinsic evidence.[1] Whoever holds the bill of lading is the owner of the goods, and their subsequent removal will not affect his title.[2] The bill of lading and the invoice are the ordinary evidence of property, but they may be controverted as to their authenticity and their truth.[3] The effect of a consignment of goods generally is to vest the property in the consignee, but if a bill of lading is special, the property vests in the person indicated.[4] The doctrine that the title passes by a bill of lading does not prevail in prize courts, where the claimant's interest is only a debt, although supported by a lien.[5] A delivery to the master is a delivery to the consignee, but this delivery may be absolute or qualified.[6] It is as much the property of the consignee, and delivered to him in point of law when shipped at the port of departure, as when unladen at the port of discharge.[7] As soon as the property is deposited with the common carrier, who is the bailee for the purpose, the title and right of property vests in the consignee.[8] When goods have been set apart in the hands of a third person, who has undertaken to deliver them to the consignee, and the latter has advanced or accepted upon the faith of such arrangement, a special property vests in the consignee.[9] To produce a change of property from the shipper to the consignee, the goods should have been sent in pursuance of some contract between the parties.[10] Where the consignee has paid full value for goods in good faith, and they have come into his possession, he stands in the light of a purchaser.[11] The vendor, in making the contract with the carrier, acts as agent of the vendee,[12] and it operates as a constructive delivery to the vendee.[13] The master is the agent of the owner, and possession by the agent is possession by the owner.[14] There is a mixed possession, actual possession in the carrier, and an implied possession in the owner.[15]

1 The Sally Magee, 3 Wall. 451; Lawrence v. Minturn, 17 How. 107; Griffith v. Ingledew, 6 Serg. & R. 429; Coleman v. Lambert, 5 Mees. & W. 502; Wright v. Snell, 5 Barn. & Ald. 350; Chandler v. Sprague, 5 Met. 305; The Idaho, 5 Ben. 232; Holliday v. Hamilton, 11 Wall. 565.

2 The Idaho, 11 Blatchf. 222; Bailey v. Hudson Riv. R. R. Co. 49 N. Y. 70.

7 Burnham v. Winsor, 5 Law Rep. 507; Parker v. Byrnes, 1 Low. 540; Donath v. Broomhead, 7 Pa. St. 301; Mottram v. Heyer, 5 Denio, 629. And see Barrett v. Goddard, 3 Mason, 107.

8 Burnham v. Winsor, 5 Law Rep. 507; Stubbs v. Lund, 7 Mass. 453; Newhall v. Vargas, 13 Me. 93; Northey v. Field, 2 Esp. 613; Feise v. Wray, 3 East, 93.

9 Lesassier v. The Southwestern, 2 Woods, 35.

10 Ex parte Flannagans, 12 Bank. Reg. 239; Bank of Ireland v. Perry, Law R. 7 Ex. 14.

11 National Bank of Commerce v. Merchants' Nat. Bank, 91 U. S. 92.

12 Lee v. Bowen, 5 Biss. 154.

§ 229. What defeats right of stoppage.—A complete delivery of the goods prevents a stoppage in transit.[1] After assignment of a bill of lading, the right of stoppage in transit is lost.[2] The effect of the indorsement of the bill of lading is to take away the right.[3] If a factor sells the goods while at sea to a *bona fide* purchaser, for a valuable consideration, the right of the principal to stop the transit is defeated.[4] Where the seller sold on four months' credit and took notes for the price, and handed all the shipping papers to the buyer, who entered the goods and warehoused them in his own name, the right of stoppage is lost;[5] but otherwise, if warehoused subject to the orders of the vendor.[6] Where a vendee of goods sells the same before reaching their destination, the right of stoppage *in transitu* is ended.[7] If goods are sent to a forwarding merchant, to await, in his hands, the instructions of the purchaser respecting any further transit, their transit is at an end when they reach such forwarder.[8] If, after the goods are ordered, the party dies insolvent, and no device or fraud to deceive the seller was used, and the goods were subsequently sent, and are taken possession of by the administrator of the buyer, the seller cannot reclaim the property.[9]

1 Barrett v. Goddard, 3 Mason, 107.

2 Currey v. Roulstone, 2 Overt. (Tenn.) 110; Walter v. Ross, 2 Wash. C. C. 287; Dick v. Lumsden, Peake, 189; Appleby v. Pollock, Abb. on Sh. 385; Snee v. Prescott, 1 Atk. 245.

3 Audenreid v. Randall, 3 Cliff. 99; Lesassier v. The Southwestern, 2 Woods, 35; Walter v. Ross, 2 Wash. C. C. 283.

4 Walter v. Ross, 2 Wash. C. C. 283.

5 Parker v. Byrnes, 1 Low. 539; Hollingsworth v. Napier, 3 Caines, 182; Foster v. Frampton, 6 Barn. & C. 107; Carter v. Willard, 19 Pick. 1; Mottram v. Heyer, 5 Denio, 629.

6 In re Foot, 11 Blatchf. 532; S. C. 11 Bank. Reg. 155; Harris v. Hart, 6 Duer, 606; S. C. 17 N. Y. 249.

7 Southern Express Co. v. Dickson, 94 U. S. 552; Blanchard v. Paige, 8 Gray, 285; Lee v. Kimball, 45 Me. 172.

8 Biggs v. Barry, 2 Curt. 262; Valpy v. Gilson, 4 Com. B. 837.

9 Conyers v. Ennis, 2 Mason, 236.

pay the hire.[2] The maritime law considers both the owner and the master as carriers of the cargo.[3] The owner of a general ship is chargeable with the responsibilities of a common carrier.[4] The owners of a steamboat engaged in carrying passengers and merchandise between port and port are responsible to shippers as a common carrier.[5] So the owners of a schooner in the carrying trade on the lakes.[6] So freighters for hire on navigable rivers are common carriers.[7] It is not necessary that the goods or property should be entered on a freight list, or that the contract be in writing.[8] Owners as carriers of the results of a whaling or fishing voyage are not common carriers, and are liable only as bailees.[9] There is no difference between carriers by land and carriers by water; each incurs the same liabilities, and is subject to the same duties,[10] and is governed by the same rules of law.[11]

1 The Huntress, 2 Ware, (Dav.) 82; Dwight v. Brewster, 1 Pick. 50; Citizens' Bank v. Nantucket S. Co. 2 Story, 16; McClures v. Hammond, 1 Bay, 99; S. C. 1 Amer. Dec. 598.

2 The Huntress, 2 Ware, (Dav.) 82; Citizens' Bank v. Nantucket S. Co. 2 Story, 16; Dwight v. Brewster, 1 Pick. 50.

3 Elliott v. Rossell, 10 Johns. 1; Oakley v. Russell, 13 Mart. 58.

4 The Gold Hunter, Blatchf. & H. 300.

5 Boney v. The Huntress, 4 Hunt's Mer. Mag. 83; Citizens' Bank v. Nantucket S. Co. 2 Story, 16.

6 Badgely v. The Juniata Patton, 1 Amer. Law Reg. 262.

7 Williams v. Branson, 1 Murph. 417; S. C. 4 Amer. Dec. 562.

8 Citizens' Bank v. Nantucket S. Co. 2 Story, 16.

9 Joy v. Allen, 2 Wood. & M. 315; Brind v. Dale, 8 Car. & P. 207; 2 Moody & R. 80; Ward v. Green, 6 Cow. 173; Beauchamp v. Powley, 1 Moody & R. 38; Shackleford v. Wilcox, 9 La. 33; Tompkins v. Saltmarsh, 14 Serg. & R. 275; Progers v. Frasier, 2 Show. 171; Caton v. Rumney, 13 Wend. 387; Robinson v. Dunmore, 2 Bos. & P. 417; Walter v. Brewer, 11 Mass. 99; Satterlee v. Groat, 1 Wend. 272; Allen v. Sewall, 2 Wend. 327; S. C. 6 Ibid. 335; Anonymous, 2 Show. 184; King v. Lenox, 19 Johns. 235; Hatchwell v. Cook, 6 Taunt. 577; 1 Salk. 249.

10 King v. Shepherd, 3 Story, 349; Elliott v. Rossell, 10 Johns. 1; Baxter v. Leland, Abb. Adm. 359; Maury v. Talmage, 2 McLean, 157.

11 New Jersey S. N. Co. v. Merchants' Bank, 6 How. 423; Dale v. Hall, 1 Wils. 281; King v. Shepherd, 3 Story, 349.

§ 231. Responsibility of owners.—The owners are bound by the contract of the master while acting within the scope of his authority.[1] They are responsible for the abuse of trust, by willful misconduct and by want of care and skill of the master,[2] and by his misfeasance or nonfeasance.[3] Misfeasance and non-feasance are gross negligence, and create a liability for consequent damage.[4] If goods are lost or damaged after their reception and before their delivery, the presumption is that such loss or damage was occasioned by default of the carrier.[5] The vessel

is liable for loss of goods in loading from a warehouse,[6] or for loss occasioned by delay in delivery occasioned by the fault of the carrier,[7] or for the value of goods delivered to the wrong person, even by mistake or imposition,[8] or for delivering in a wrong place or wrong mode, or leaving them unwatched or unguarded,[9] or for loss by stranding during the absence of the crew.[10] Where no account of how the goods were lost was given, yet the vessel was held responsible.[11] In the stowage and transportation of goods the acts of the master are binding on the owners.[12] The vessel is liable for injury or damage by overloading pier to the extent of the injury to the cargo and expenses incurred in its recovery.[13] The owners of a vessel are liable to the owners of the cargo for loss by a barratrous wreck, for the value of the goods lost, the injury to those saved, and for money paid for salvage.[14] A vessel is liable for damage caused to the goods of one shipper by those of another, although the goods are stowed in the usual way, if the goods of the third party were in a bad condition when put on board.[15] A steamboat enrolled and registered as a coasting vessel is liable for a debt contracted by one placed in possession and control by owner and designated as master;[16] but the clerk of a steamboat has no power to bind the boat for a loan of money without the authority of the master.[17]

1 The Zenobia, Abb. Adm. 52; The Flash, Id. 70; Edwin v. The Naumkeag S. C. Co. 1 Cliff. 330; The Phœbe, 1 Ware, 263; Naylor v. Baltzell, Taney, 60; Ellis v. Turner, 8 Term Rep. 531; Merchants' Bank v. State Bank, 10 Wall. 673; Grant v. Norway, 10 Com. B. 665; 2 Eng. L. & E. 337; Coleman v. Riches, 16 Com. B. 104; 20 Eng. L. & E. 323; Smith v. The Creole, 2 Wall. Jr. 519; Drinkwater v. The Spartan, 1 Ware, 149; The Rebecca, 1 Ware, 188. And see New Jersey S. N. Co. v. Merchants' Bank, 6 How. 430; Roberts v. Dallas, Bee, 239; Pendleton v. Franklin, 3 Seld. 503; The Williams, 1 Brown Adm. 224; The Freeman v. Buckingham, 18 How. 191; Waller v. Brewer, 11 Mass. 99; Joy v. Allen, 2 Wood. & M. 318; Nichols v. De Wolf, 1 R. I. 277; Boucher v. Lawson, Hardw. 85; The Waldo, 2 Ware (Dav.) 165; Kemp v. Coughtry, 11 Johns. 107.

2 Ralston v. The State Rights, Crabbe, 46; Reynolds v. Toppan, 15 Mass. 370; Dean v. Angus, Bee, 63; Fletcher v. Braddick, 2 Bos. & P. N. R. 182; The Lady Pike, 21 Wall. 16; Tait v. Levi, 14 East, 481; The Dundee, 1 Hagg. Adm. 109; Beckman v. Shouse, 5 Rawle, 179.

3 New Jersey S. N. Co. v. Merchants' Bk. 6 How. 429; Patapsco Ins. Co. v. Coulter, 3 Peters, 222; Dean v. Angus, Bee, 669; Mandeville v. Cookendorfer, 3 Cranch C. C. 401; Morse v. Slue, 1 Vent. 190, 238.

4 New Jersey S. N. Co. v. Merchants' Bk. 6 How. 429; Tracy v. Wood, 3 Mason, 135; Bell v. Reed, 4 Binn. 127; Beckman v. Shouse, 5 Rawle, 179; Smith v. Horne, 8 Taunt. 144; Sleat v. Fagg, 5 Barn. & Ald. 342; Birkett v. Willan, 2 Barn. & Ald. 353; Beck v. Evans, 16 East, 244; Duff v. Budd, 3 Brod. & B. 183; Wyld v. Pickford, 8 Mees. & W. 460; Owen v. Burnett, 2 Cromp. & M. 360.

5 Choate v. Crowninshield, 3 Cliff. 184.

6 The R. G. Winslow, 4 Biss. 16; De Mott v. Laraway, 14 Wend. 225.

7 The City of Dublin, 1 Ben. 53; Wibert v. N. Y. and E. R. R. Co. 12 N. Y. 245; S. C. 19 Barb. 36; Wilson v. Lancashire and Y. R. R. Co. 9 Com. B. N. S. 632.

8 The Santee, 2 Ben. 523; The Eddy, 5 Wall. 481; The Huntress, 2 Ware, (Dav.) 82; Smith v. Horne, 8 Taunt. 144; N. J. S. N. Co. v. Merchants' Bk. 6 How. 429.

9 N. J. S. N. Co. v. Merchants' Bk. 6 How. 429; Smith v. Horne, 8 Taunt. 144.

10 The Sarah, 2 Sprague, 30.

11 The Bellona, 4 Ben. 503.

12 The Waldo, 2 Ware, (Dav.) 161.

13 Kennedy v. Dodge, 1 Ben. 311; Vose v. Allen, 3 Blatchf. 289.

14 The William Taber, 2 Ben. 329.

15 The Cheshire, 2 Sprague, 30; Lamb v. Parkman, 1 Sprague, 354; Baxter v. Leland, Abb. Adm. 348; S. C. 1 Blatchf. 526.

16 Pendleton v. Franklin, 3 Seld. 508.

17 McAllister v. The Sam Kirkman, 1 Bond, 369.

§ 232. Seaworthiness.—The duty of the owners, as carriers, is to provide a seaworthy vessel, with suitable officers and crew.[1] A warranty of seaworthiness includes a warranty of a competent master and crew,[2] but not that an insurance company will be willing to insure.[3] Nor that the master shall possess skill, judgment, and courage in an extraordinary degree.[4] In the contract of affreightment it is not a tacit or implied condition that she is seaworthy, as it is in insurance.[5] It is not such that it will defeat the right to freight, if the vessel should prove seaworthy.[6] The fact that the vessel is not a common carrier does not relieve her from the implied warranty in a contract of affreightment that she is sound, staunch, and seaworthy.[7] It is the duty of the carrier to know the condition of the vessel in which he proposes to carry goods.[8] He is bound to know the hazards of the business.[9] To be seaworthy, the hull should be so tight, staunch, and strong as to resist the ordinary action of the sea during the voyage, without loss or damage to cargo,[10] and the ship must be furnished with proper compasses.[11] Leakage is notice of unseaworthiness, and an attempt to proceed on the voyage renders the carrier liable for loss of cargo.[12] The cargo means the goods on board the vessel,[13] and leaving port on any trade or business is a departure in respect to repairs of the vessel.[14] Seaworthiness is to be determined by the facts in each particular case.[15] That a vessel springs a leak after a few hours' sail is no legal presumption of unseaworthiness.[16] The owner is bound to keep the vessel seaworthy,[17] to have the vessel in a state of repairs at every port where she may be, and he is liable for any damage for want of such repairs,

whether the defect be known or unknown to the owners.[18] It is a useful and proper precaution for a master to note a protest at the first port of his arrival after an accident, but not an indispensable duty.[19] Where it was possible to reach a harbor to have repairs made, the cargo is not chargeable for the expense of towage in case of injury to the rudder.[20]

1 The Niagara *v.* Cordes, 21 How. 7; The Planter, 2 Woods, 490; Barrels of Salt, 2 Biss. 319; Lord *v.* Goodall N. & P. S. S. Co. 4 Sawy. 292.

2 The Vincennes, 3 Ware, 171; Bazin *v.* The Steamship Co. 3 Wall. Jr. 229; Brown *v.* The D. S. Cage, 1 Woods, 401.

3 The Vincennes, 3 Ware, 171.

4 Patten *v.* Darling, 1 Cliff. 263; Lawrence *v.* Minturn, 17 How. 100.

5 Forbes *v.* Rice, 2 Brev. 363; S. C. 4 Amer. Dec. 589. And see Wilson *v.* Griswold, 9 Blatchf. 269; Lyon *v.* Mells, 5 East, 428. See ANTE, § 202.

6 Forbes *v.* Rice, 2 Brev. 353; S. C. 4 Amer. Dec. 589; Kellogg *v.* Lacrosse &c. Packet Co. 3 Biss. 496.

7 Wilson *v.* Griswold, 9 Blatchf. 269; Lyon *v.* Mells, 5 East, 428; The Planter, 2 Woods, 490; Dupont *v.* Vance, 19 How. 162.

8 The Northern Belle, 9 Wall. 526.

9 Saltonstall *v.* Stockton, Taney, 11.

10 Dupont *v.* Vance, 19 How. 162; Harmer *v.* Bell, 7 Moore P. C. 267.

11 Lord *v.* Goodall N. & P. S. Co. 4 Sawy. 292.

12 Kellogg *v.* Lacrosse &c. Packet Co. 3 Biss. 496.

13 Seamans *v.* Loring, 1 Mason, 127.

14 Rockfeller *v.* Thompson, 2 Sand. 395.

15 The Northern Belle, 9 Wall. 526; Sherwood *v.* Ruggles, 2 Sand. 55.

16 Sherwood *v.* Ruggles, 2 Sand. 55.

17 The Gentleman, Olcott, 116; Putnam *v.* Wood, 3 Mass. 481; 3 Amer. Dec. 179; Mercantile Ins. Co. *v.* Clapp, 11 Pick. 56; Kimball *v.* Tucker, 10 Mass. 192.

18 Putnam *v.* Wood, 3 Mass. 481; S. C. 3 Amer. Dec. 179; Werk *v.* Leathers, 1 Woods, 272; Whitall *v.* The William Henry, 4 La. 223; Lyon *v.* Mells, 5 East, 428; The Casco, 2 Ware (Dav.) 192.

19 Hunt *v.* The Cleveland, Newb. 224; S. C. 6 McLean, 79; Senat *v.* Porter, 7 Term Rep. 158; The Emma, 2 W. Rob. 315.

20 Barrels of Salt, 2 Biss. 319.

§ 233. Advertising sailing.—The owner of the vessel is responsible for misrepresentation in the advertisement, as to the character of the vessel, time of sailing, and proposed voyage.[1] It is his duty to advertise any change in the course or ultimate destination of the vessel.[2] The ship-owners are bound to carry the goods by the ship which was advertised to sail, unless prevented by some event beyond their control.[3] Shippers are not bound to seek or accept any other mode of conveyance than that specified in the bill of lading.[4] Where the carrier changes the vessel he is deemed to substitute different risks, and

is considered as insuring against loss, even if it arose from causes excepted in the bill of lading.[5] If, without any legal justification, the carrier refuses to perform the voyage, but offers to return the goods, and the offer is not accepted, he is bound to make compensation only for the actual damage sustained.[6]

1 The Zenobia, Abb. Adm. 80; Runquest v. Ditchell, 3 Esp. 64; Sanderson v. Busher, 4 Camp. 54, note; Magelhaens v. Busher, 4 Camp. 54; Freeman v. Baker, 5 Barn. & Ald. 797; Cranston v. Marshall, 5 Exch. 395; Glaholm v. Hays, 2 Man. & G. 257; Ollive v. Booker, 1 Exch. 416; Cobb v. Howard, 3 Blatchf. 524; Trott v. Wood, 1 Gall. 443.

2 Peel v. Price, 4 Camp. 243.

3 Harrison v. Stewart, Taney, 485; Trott v. Wood, 1 Gall. 443; Plantamour v. Staples, 1 Term Rep. 611.

4 Harrison v. Stewart, Taney, 485.

5 Bazin v. The Richardson, 10 Law Rep. N. S. 128; S. C. 5 Amer. Law Reg. 459.

6 Harrison v. Stewart, Taney, 485.

§ 234. Rights, duties, and obligations of carriers. The rights and obligations of carriers depend upon the law of the place where the contract is made, or where it is to be executed;[1] of ships navigating the lakes must be determined by the rules of law applicable to carriers upon such internal waters.[2] Common carriers are bound to receive goods for carriage,[3] and are entitled to the exclusive use of their vehicles.[4] The master of the vessel is bound to carry goods shipped to their destination, unless prevented by the act of God or the public enemy, the act of the shipper, or one of the excepted perils.[5] Where a vessel takes a cargo late in the season, and is laid up by stress of weather, it is her duty to complete the voyage in the spring.[6] The duty of the carrier extends to all that relates to loading, safe keeping and transportation, and right delivery, and for all these the vessel is liable.[7] Evidence of usage cannot be admitted to control or vary the positive stipulations of a bill of lading, or to substitute for its express terms an implied agreement or usage that the carrier shall not be bound to keep, transport, and deliver the goods in good order and condition.[8] The master is not, in general, bound to transport the goods on land, but his contract is fulfilled by delivery from his ship at the proper place within the port.[9] Where a broker contracted to have goods shipped, but refused to ship them, the carrier may refuse to receive them.[10]

1 Naylor v. Baltzell, Taney, 55.

2 The Niagara v. Cordes, 21 How. 7.

3 Rosenfield *v.* The Express Co. 1 Woods, 135; Sheridan *v.* The New Quay Co. 4 Com. B. N. S. 618.

4 The D. R. Martin, 11 Blatchf. 235; Jencks *v.* Coleman, 2 Sum. 221; Burgess *v.* Clements, 4 Maule & S. 306; Fell *v.* Knight, 8 Mees. & W. 269; Commonwealth *v.* Power, 7 Met. 596.

5 The Maggie Hammond, 9 Wall. 455, questioning The Pacific, Brown & L. 243. And see The Niagara *v.* Cordes, 21 How. 27; Elliott *v.* Rossell, 10 Johns. 1; New Jersey S. N. Co. *v.* Merchants' Bk. 6 How. 428; Bank of Orange Co. *v.* Brown, 3 Wend. 158; Pendall *v.* Bench, 4 McLean, 259; Burritt *v.* Bench, Ibid. 325.

6 Murray *v.* Ætna Ins. Co. 4 Biss. 417. See *ante*, § 209.

7 Clark *v.* Barnwell, 12 How. 272; The Lady Pike, 21 Wall. 15; The Niagara *v.* Cordes, 21 How. 27; King *v.* Shepherd, 3 Story, 349; Laveroni *v.* Drury, 8 East, 166; The Commander-in-Chief, 1 Wall. 51; Clark *v.* Barnwell, 12 How. 272; Richardson *v.* Winsor, 3 Cliff. 402.

8 The Delaware, 14 Wall. 606; The Reeside, 2 Sum. 567; Garrison *v.* Memphis Ins. Co. 19 How. 316.

9 The Boston 1 Low. 468; Bourne *v.* Gatliffe, 3 Man. & G. 643; 7 Ibid. 850; 4 Bing. N. C. 314; Humphreys *v.* Reed, 6 Whart. 435; Hemphill *v.* Chenie, 6 Watts. & S. 62; Ostrander *v.* Brown, 15 Johns. 39.

10 The A. Cheeseborough, 3 Blatchf. 305.

§ 235. Obligations reciprocal.—In every contract of affreightment, whether by charter party, bill of lading, or by parol, the obligations are mutual and reciprocal: the ship is bound to the merchandise and the merchandise to the ship,[1] for the due performance of the contract.[2] A mutual obligation is created by law, even if not stipulated in the contract;[3] but some contract of affreightment must have been made,[4] and an executory contract for transportation or for the services of the vessel creates no lien.[5] By the maritime law, the vessel is bound to the shipper for the performance of the contract,[6] for the safe custody, due transportation, and right delivery of the cargo,[7] is bound in specie for the fulfillment of the contract of the master, made within the scope of his authority;[8] the ship, with her tackle and freight, and the cargo, are respectively bound by the covenants of the charter party.[9] In every contract of affreightment the ship is hypothecated to the shipper for any damage to the goods from insufficiency of the vessel, or the fault of the master or crew,[10] or for cargo lost by jettison,[11] or for deficiency in cargo,[12] for value of goods sold by the master for necessaries in part consumed by the crew and passengers,[13] for the value of goods, notwithstanding depredations.[14] The vessel is liable *in rem* for goods laden on board by the charterers.[15] The lien of the shipper attaches, though the whole voyage is within the State.[16] The lien attaches on the contract of affreightment, even before the cargo is delivered on board;[17] but when there has been no delivery of the goods to the master, the contract creates no lien.[18] Where

226; The William and Emmeline, Blatchf. & H. 66; The Packet, 3 Mason, 255; The Gratitudine, 3 C. Rob. 240; The Leonidas, Olcott, 16; Mutual S. Ins. Co. *v.* The George, Olcott, 96.

14 The Gold Hunter, Blatchf. & H. 306; Ross *v.* The Active, 2 Wash. C. C. 226; Morse *v.* Slue, 1 Vent. 190; Schieffelin *v.* Harvey, 6 Johns. 170; American Ins. Co. *v.* Coster, 3 Paige, 323.

15 The Aberfoyle, Abb. Adm. 256; The Flash, Ibid. 67; The Rebecca, 1 Ware, 188.

16 Francis *v.* Harrison, 1 Sawy. 369; The Belfast, 7 Wall. 624.

17 The Williams, 1 Brown Adm. 219, distinguishing Grant *v.* Norway, 10 Com. B. 665, and disapproving dicta in Vandewater *v.* Mills, 19 How. 82. And see The Edwin, 1 Sprague, 434; Salmon Falls Manuf. Co. *v.* The Tangier, 11 Law Rep. N. S. 6. *Contra*, The Flash, Abb. Adm. 70. See *ante*, sec. 218.

18 The Pauline, 1 Biss. 398, distinguishing Hanna *v.* The Carrington, 2 West. Law Mon. 456. And see The R. G. Winslow, 4 Biss. 17; Vandewater *v.* Mills, 19 How. 82; S. C. McAll. 9; The Freeman *v.* Buckingham, 18 How. 182; The Joseph Grant, 1 Biss. 193.

19 The Edwin, 1 Sprague, 482, explaining The Flash, Abb. Adm. 70; Morewood *v.* Pollock, 1 El. & B. 743; The Tangier, 21 Law Rep. 6.

20 The H. B. Foster, 3 Ware, 167; The Boston, Blatchf. & H. 309; The Belfast, 7 Wall. 624; The Keokuk, 1 Biss. 522.

21 Edwards *v.* The Stockton, Crabbe, 582; Cole *v.* The Atlantic, Crabbe, 444; The Rebecca, 1 Ware, 188.

22 Bryans *v.* Nix, 4 Mees. & W. 775; Nesmith *v.* Dyeing B. & C. Co. 1 Curt. 135; Patten *v.* Thompson, 5 Maule & S. 350; Gibson *v.* Stevens, 8 How. 384; Hallé *v.* Smith, 1 Bos. & P. 563.

§ 236. Duty of master as to stowage.—The duty of the master extends to all that relates to loading of the cargo.[1] He is bound to secure the cargo under deck.[2] Goods stowed on deck are at his risk.[3] He is bound to due diligence and skill in the stowage and staying the cargo, but there is no absolute warranty that what is done shall prove sufficient.[4] Stowage of merchandise on the main deck of a propeller, unusually well constructed for the purpose, held no fault.[5] It is culpable negligence in the master to stow goods marked "in cabin state-room" in the hold, when it was the invariable practice to stow them in the cabin.[6] Though parol evidence is not admissible to show an agreement for stowage on deck, yet it may be admitted to show a supplemental agreement for a particular stowage under deck.[7] The master is bound to stow the goods in reference to their condition.[8] It is the duty of the master to see that the goods are so stowed that the different goods may not be injured by each other, or by the motion or leakage of the vessel, unless by agreement that service is to be performed by the shipper.[9] In taking on coal oil and paper he is bound to use especial care in stowage.[10] So in the stowage of wheat in bags and

kerosene.[11] So in stowage of cotton.[12] A warranty in a ship's policy, "not to load more than her registered tonnage," is broken by carrying an excess of dunnage.[13]

1 The R. G. Winslow, 4 Biss. 13; The Lady Pike, 21 Wall. 15; Laveroni v. Drury, 8 Ex. 166.

2 The Delaware, 14 Wall. 604; The Rebecca, 1 Ware, 188; The Waldo, 2 Ware (Dav.) 161; The Niagara v. Cordes, 21 Wall. 7.

3 The Rebecca, 1 Ware, 188; The Paragon, Ibid. 322; The Waldo, 2 Ware (Dav.) 161.

4 Lawrence v. Minturn, 17 How. 100; Mephams v. Bicssel, 9 Wall. 370; S. C. 1 Woolw. 225; Patton v. Magrath, Rice, 162; Dutton v. Steam Tug Express, 3 Cliff. 462.

5 The Neptune, 6 Blatchf. 193.

6 The Star of Hope, 17 Wall. 651.

7 The Star of Hope, 2 Sawy. 20; Chouteaux v. Leech, 18 Pa. St. 223; The Delaware, 14 Wall. 606; Barber v. Brace, 3 Conn. 9.

8 The David and Caroline, 5 Blatchf. 266.

9 The Delaware, 14 Wall. 602; Alston v. Herring, 11 Exch. 822; Sandeman v. Scurr, Law Rep. 2 Q. B. 86; The Niagara v. Cordes, 21 Wall. 7; Swainston v. Garrick, 2 Law J. N. S. 255; Anglo-African Co. v. Lamzed, Law Rep. C. P. 229.

10 The Sabloncello, 7 Ben. 357; Muddle v. Stride, 9 Car. & P. 380.

11 Nettleton v. The Fanny Fosdick, 4 Blatchf. 374; S. C. 18 How. Pr. 328.

12 Brower v. The Water Witch, 19 How. Pr. 241.

13 Insurance Co. v. Thwing, 13 Wall. 672.

§ 237. Duties and obligations of shippers.—Shippers undertake not to deliver for carriage, packages of a dangerous nature without expressly giving notice that they are of such a nature.[1] It is the duty of the shipper to notify the carrier of the dangerous qualities of a package.[2] Carriers are not required to know and not entitled to be informed as to the contents of the packages;[3] they are not bound to ask the contents of the package.[4] The want of greater care in stowage of dangerous packages is not a fault.[5]

1 Pierce v. Winsor, 2 Cliff. 27; Brass v. Maitland, 6 Ellis & B. 470; Parrott v. Barney, 2 Abb. U. S. 222; Farrant v. Barnes, 11 Com. B. 553; Vandewater v. Mills, 19 How. 82.

2 The Nitro-Glycerine Case, 15 Wall. 535; Brass v. Maitland, 6 Ellis & B. 470; Parrott v. Barney, 2 Abb. U. S. 222; Pierce v. Winsor, 2 Cliff. 18; Farrant v. Barnes, 11 Com. B. 553. See Hutchinson v. Guion, 3 Com. B. N. S. 149.

3 Parrott v. Barney, 1 Sawy. 447; S. C. 2 Abb. U. S. 221; Nitro-Glycerine Case, 15 Wall. 535; Cranch v. London & N. W. R. Co. 14 Com. B. 254; Brass v. Maitland, 6 Ellis & B. 470.

4 The Nitro-Glycerine Case, 15 Wall. 535; Brass v. Maitland, 6 Ellis & B. 470.

5 Parrott v. Barney, 2 Abb. U. S. 228; Pierce v. Winsor, 2 Cliff. 27.

§ 238. Obligations on wreck or stranding.—The obligations, duties, and liabilities of the carriers still continue, after the wreck or stranding of the vessel;[1] their duty as to safe custody, due transportation, and right delivery still continues;[2] they are bound to show diligence, care, and skill to save the property from being lost,[3] and they are responsible for any loss which human skill and prudence could prevent.[4] Their duty is not ended till the goods are delivered at their destination, or returned to the owner or kept till the owner may reclaim them, or till they are disposed of according to law.[5] The duty of the master, in case of disaster, is to forward the cargo in another vessel, if practicable,[6] and he may charge for increased freight for the hire of the vessel so procured.[7] Where a vessel is driven into a port of distress, the master is bound to repair her or procure another vessel,[8] and forward their goods to their destination; and if on the lakes, a land carriage may be resorted to;[9] and if he fail to do so he is not entitled to freight.[10] After the loss of the vessel the master is agent to transhipment freight for the merchant,[11] and where they could easily have been consulted the carrier had no right to sell the cargo.[12] Where the ship is abandoned for a total loss, he cannot sell and invest the proceeds in other goods, unless justified by necessity or high expediency; but if the parties receive the property, and the master acts without fraud, he is entitled to a reasonable compensation and expenses.[13] Where he transhipments goods and takes a bill of lading deliverable to his own order, and on arrival they are not delivered to the consignee but sold, the sale is invalid.[14]

1 McAndrews *v.* Thatcher, 3 Wall. 369; The Niagara *v.* Cordes, 21 How. 7; Elliott *v.* Rossell, 10 Johns. 1; Copeland *v.* Security Ins. Co. Woolw. 283; King *v.* Shepherd, 3 Story, 356; Barclay *v.* Curculla y Gana, 3 Doug. 389; New Jersey S. N. Co. *v.* Merchants' Bk. 6 How. 436; The Lady Pike, 21 Wall. 15; The Maggie Hammond, 9 Wall. 459; Plantamour *v.* Staples, 1 Term Rep. 611.

2 The Maggie Hammond, 9 Wall. 459; Elliott *v.* Rossell, 10 Johns. 1; King *v.* Shepherd, 3 Story, 356.

3 The Niagara *v.* Cordes, 21 How. 27; King *v.* Shepherd, 3 Story, 349; Elliott *v.* Rossell, 10 Johns. 1.

4 McAndrews *v.* Thatcher, 3 Wall. 369; King *v.* Shepherd, 3 Story, 349; The Niagara *v.* Cordes, 21 How. 27; Elliott *v.* Rossell, 10 Johns. 1; The Maggie Hammond, 9 Wall. 459.

5 The Niagara *v.* Cordes, 21 How. 28; King *v.* Shepherd, 3 Story, 349; New Jersey S. N. Co. *v.* Merchants' Bk. 6 How. 436.

6 The Maggie Hammond, 9 Wall. 435, questioning The Pacific, Brown & L. 243; Cannan *v.* Meaburn, 1 Bing. 243, 465; King *v.* Shepherd, 3 Story, 349.

7 The Maggie Hammond, 9 Wall. 455; The Niagara *v.* Cordes, 21 How. 7.

8 Bork v. Norton, 2 McLean, 422.

9 Bork v. Norton, 2 McLean, 422; Searle v. Scovell, 4 Johns. Ch. 218.

10 Bork v. Norton, 2 McLean, 422.

11 Copeland v. The Phœnix Ins. Co. Woolw. 284; Hunter v. Prinseps, 10 East, 378; Shipton v. Thornton, 9 Adol. & E. 314; Jordan v. Warren Ins. Co. 1 Story, 342.

12 The Joshua Barker, Abb. Adm. 219; Amory v. McGregor, 15 Johns. 24; Bracket v. McNair, 14 Johns. 170.

13 Lawrence v. New Bedford Com. Ins. Co. 2 Story, 471.

14 Everett v. Saltus, 15 Wend. 474.

§ 239. Duty of master on arrival.—It is the duty of the master, before placing the vessel in a berth, to ascertain whether the depth of water is sufficient.[1] A notice to consignee on arrival of time and place of delivery, or some equivalent to notice, is necessary.[2] The publication of the cargo list in a newspaper is not notice to consignee sufficient to discharge the owner from liability under the bill of lading.[3] The due and proper separation of the goods for the use of the consignee is an indispensable prerequisite, in addition to notice of time and place of delivery.[4] Where the goods arrive partly damaged and partly sound, it is his duty to separate them in different lots, if required, to obtain a favorable sale at auction.[5] After discharge and separation of consignments, if the consignee refuse to receive the goods, the master cannot leave or abandon the goods. He should put them in a place of safety, to avoid further liability.[6] He should store them, and notify the consignee or owners that they are stored subject to the lien for freight and charges, to avoid further liability.[7] He should store them with some third party, subject to the order of the consignee or owner, on payment of freight and charges.[8] So, if the consignee is absent, goods should be stored;[9] or if the indorsee of the bill of lading cannot be found, he should retain the goods till claimed, or store them prudently, for and on account of their owner.[10] Where the consignee had given the ship's agent instructions not to store the goods left on the wharf, the vessel is not liable for damage thereto, if ordinary care was used to preserve them.[11] Where he stored goods before actual tender to the consignee, and they fell in value, the consignee is entitled to reimbursement for the loss.[12] Where notice was not given to the consignee, proof of the carrier's custom to store them would not relieve from liability without special agreement.[13] Where the bill of lading shows that the voyage named is but part of a longer transit, the master is presumed to have contracted in reference to the course of

trade as to forwarding cargo,[13] and if an obstacle should intervene, he should wait and notify the consignee, so as to receive instructions.[14] Where the master is not able to effect a sale of the cargo as to orders, he may leave it to be disposed of in the future.[15]

1 Nelson *v.* The Phœnix Chem. Works, 7 Ben. 37.

2 The Peytona, 2 Curt. 26; Salmon Falls M. Co. *v.* The Tangier, 1 Cliff. 401; The Grafton, Olcott, 43; Gibson *v.* Culver, 17 Wend. 305; Ostrander *v.* Brown, 15 Johns. 39; Price *v.* Powell, 3 N. Y. 322; Gatliffe *v.* Bourne, 4 Bing. N. C. 314; Chickering *v.* Fowler, 4 Pick. 371; Merwin *v.* Butler, 17 Conn. 138; The Ben Adams, 2 Ben. 449; Magill *v.* Potter, 2 Johns. 37.

3 Caruana *v.* British and S. P. Co. 6 Ben. 517.

4 The Santee, 2 Ben. 524; Partridge *v.* The Ben. Adams, 2 Ben. 445; The Eddy, 5 Wall. 481; Ex parte Easton, 95 U. S. 75; The Middlesex, 11 Law Rep. N. S. 14.

5 The Columbus, Abb. Adm. 37, 97.

6 Richardson *v.* Goddard, 23 How. 28; Vose *v.* Allen, 3 Blatchf. 289; The Grafton, Olcott, 49; Ostrander *v.* Brown, 15 Johns. 39; Chickering *v.* Fowler, 4 Pick. 371; The Eddy, 5 Wall. 481; Kohn *v.* Packard, 3 La. 224; The Tangier, 3 Wall. 119; Price *v.* Powell, 3 N. Y. 322; Gatliffe *v.* Bourne, 4 Bing. (N. C.) 314; Miller *v.* Steam Nav. Co. 13 Barb. 361.

7 The Eddy, 5 Wall. 495; Richardson *v.* Goddard, 23 How. 28; Hyde *v.* Trent and M. Nav. Co. 5 Term Rep. 389; Brittan *v.* Barnaby, 21 How. 527; The Defiance, 6 Ben. 162; The Santee, 7 Blatchf. 186.

8 Fox *v.* Holt, 4 Ben. 301, note; Atlantic and P. G. Co. *v.* The Robert Center, U. S. Dist. Ct. not reported; The Convoys, Wheat, 3 Wall. 225; Arthur *v.* The Cassius, 2 Story, 81.

9 The Harriman, 9 Wall. 171; Fisk *v.* Newton, 1 Denio, 45.

10 The Thames, 14 Wall. 98; S. C. 7 Blatchf. 226; 3 Ben. 279; The Peytona, 2 Curt. 21.

11 Ellsworth *v.* The Wild Hunter, 2 Woods, 315.

12 House *v.* Lexington, 2 N. Y. Leg. Obs. 4.

13 The Convoys, Wheat, 3 Wall. 225.

14 The Convoys, Wheat, 3 Wall. 225.

15 Day *v.* Noble, 2 Pick. 615; Lawler *v.* Keaquick, 1 Johns. Cas. 74.

§ 240. Discharge of cargo.—Discharge imports unlading, not delivery.[1] The master must discharge the cargo with proper care and skill.[2] The vessel is bound to deliver her cargo at a proper place; that is, at a place proper for the amount which is to be landed.[3] Where the master binds himself to deliver at a place specified, he must do so, although the consignee refuses to receive them. He must land and store them, and not carry them to another port for sale.[4] Carriers are excused from the delivery of the cargo at the specified port by the interposition of sanitary or prohibitory laws, risks which fall on the shipper.[5] A recital in the contract of affreightment that the vessel is bound to a certain wharf is a contract to deliver at that particular wharf, and the vessel has not arrived till she

reaches that wharf.[6] The cargo may be landed at the usual wharf. He is not required to transport it to the storehouses of the merchant,[7] but the owner of the whole cargo may order the discharge at any suitable place within the port.[8] In the absence of usage, when there are two or more wharves equally convenient to the carrier, he is bound to deliver at the one most convenient to the shipper or charterer.[9] The owners of the vessel take the risk of the weather during unlading, and the consignee takes the risks of the roads and means of transportation from the dock.[10]

1 The Kimball, 3 Wall. 43; Certain Logs of Mahogany, 2 Sum. 589; Sears v. Bags of Linseed, 1 Cliff. 68; Certain Logs of Mahogany, 2 Sum. 589.

2 Vose v. Allen, 3 Blatchf. 289.

3 Kennedy v. The William E. Dodge, 1 Ben. 315; The Majestic, 3 Blatchf. 287; Vose v. Allen, 3 Blatchf. 289.

4 Arthur v. The Cassius, 2 Story, 81.

5 Bradstreet v. Heran, Abb. Adm. 209; Morgan v. Ins. Co. of N. A. 4 Dall. 445.

6 Cain v. Garfield, 1 Low. 483; Higgins v. U. S. M. S. S. Co. 3 Blatchf. 282.

7 Salmon Falls Manuf. Co. v. The Tangier, 1 Cliff. 396; The Peytona, 2 Curt. 21; Richardson v. Goddard, 23 How. 28.

8 The Boston, 1 Low. 465. And see Chickering v. Fowler, 4 Pick. 371.

9 The Boston, 1 Low. 466; The E. H. Fittler, 1 Low. 114.

10 The Grafton, Olcott, 43; S. C. 1 Blatchf. 173.

§ 241. Duty of consignee on arrival.—It is the duty of the consignee to be present and receive the goods as discharged from the vessel,[1] but the master must show that the cargo is in good order.[2] The consignee and master are expected to co-operate, and the delinquent party must abide the consequence.[3] The consignee is bound to take the goods at the vessel's side,[4] to receive the goods out of the ship or on the wharf.[5] In case of a naked consignment, there may be a further obligation to secure the property after it is unladen.[6] He may arrange with the owners of the vessel or the consignors of the cargo as to the time and manner of delivering,[7] but he is bound to remove the cargo as fast as delivered.[8] The assignee of the bill of lading has no right to demand the delivery of the cargo without paying the freight, but he may have it discharged.[9]

1 The Tangier, 3 Ware, 116; Goold v. Chapin, 10 Barb. 612; 20 N. Y 259.

2 Germania Ins. Co. v. Lacrosse, 3 Biss. 501.

3 Salmon Falls Manuf. Co. v. The Tangier, 1 Cliff. 404; Britton v. Barnaby, 21 How. 527.

4 The Grafton, Olcott, 43; Sprague v. West, Abb. Adm. 548.
5 Dibble v. Morgan, 1 Woods, 406; The Grafton, Olcott, 43.
6 The Grafton, Olcott, 43; S. C. Abb. Adm. 552, note.
7 The Grafton, Olcott, 43; S. C. 1 Blatchf. 173.
8 The Grafton, Olcott, 43; S. C. 1 Blatchf. 173.
9 The Treasurer, 1 Sprague, 473.

§ 242. Delivery of cargo.—A delivery implying mutual and concurrent acts of carrier and consignee is equivalent to tender and acceptance.[1] An offer of the consignee to give security to pay freight, "if legally liable," is not a sufficient tender of security.[2] When a carrier has given a bill of lading, or other instrument substantially equivalent thereto, he may require a surrender, or a reasonable indemnity against claims thereon, before delivering the freight.[3] Where the carrier has no notice of the ownership of the property other than that relied from the relation of consignor and consignee, any sufficient delivery to the consignee is good against the consignor.[4] Where the shipper obtained the goods by fraud, a delivery to the real owner is valid.[5] The carrier cannot dispute the title of the shipper, except when the true owner has compelled a delivery by judicial proceedings, or where the shipper obtained the goods by fraud, and not then while he actually retains their possession.[6] He cannot, of his own motion, set up title in another as a reason for not delivering the goods to the shipper or his consignee.[7] If he assumes the burden of proving another to be the true owner, and to show that he has made delivery to such owner, he should be discharged of his contract to deliver to the assumed owner.[8] Where goods are attached in the hands of a carrier, he is justified in retaining them pending the attachment proceedings.[9] He may refuse to deliver them under an agreement with the sheriff that they should be returned.[10] A master is not bound to deliver to a transient person who has no place of business.[11] Where the master refused to deliver goods the shipper may replevy or bring trover for them.[12]

1 The Grafton, Olcott, 47; Ostrander v. Brown, 15 Johns. 39.

2 Fox v. Holt, 36 Conn. 558.

3 Howard v. Sheppard, 9 Com. B. 297.

4 Southern Express Co. v. Dickson, 94 U. S. 551; Sweet v. Barney, 23 N. Y. 325; London & N. W. R. Co. v. Bartlett, 7 N. H. 400; Mitchell v. Ede, 11 Adol. & E. 888; Foster v. Frampton, 6 Barn. & C. 107.

5 Hentz v. The Idaho, 14 Int. Rev. Rec. 134; S. C. 11 Blatchf. 218; 5 Ben. 285; Bates v. Stanton, 1 Duer, 79; Sheridan v. The New Quay Co. 4 Com. B. N. S. 618.

6 Rosenfield v. The Express Co. 1 Woods, 131.

7 Rosenfield v. The Express Co. 1 Woods, 135; Bliven v. Hudson River R. R. Co. 36 N. Y. 403; Harker v. Dement, 9 Gill, 7; Edson v. Weston, 7 Cow. 278.

8 The Idaho, 11 Blatchf. 220; Rogers v. Weir, 34 N. Y. 463; Bliven v. Hudson River R. R. Co. 36 N. Y. 403; Bassett v. Spofford, 45 N. Y. 387; Sheridan v. The New Quay Co. 4 Com. B. N. S. 618; Finlay v. Liverpool & G. W. S. S. Co. 23 Law T. 251.

9 Stiles v. Davis, 1 Black, 101. And see The Mary Ann Guest, Olcott, 498.

10 The Lord, Chase Dec. 527.

11 Mayell v. Porter, 2 Johns. Cas. 371.

12 Portland Bank v. Stubbs, 6 Mass. 422; S. C. 4 Amer. Dec. 151.

§ 243. Effect of custom and usage.—The delivery of goods at the port of destination is governed by the particular usages of trade;[1] so as to time and mode.[2] A custom at a port of delivery becomes part of the contract.[3] If there be no particular custom the general usage of commerce applies.[4] The usages of commerce require the consignee to receive the goods out of the ship, or on the wharf, the carrier giving due and reasonable notice of arrival to the consignee.[5] A usage of wharfingers to accept goods is not a good and valid usage.[6] Where there is an established custom to deliver at the wharf, with notice to owner of time and place of unloading, it is sufficient.[7] The master of a general ship may proceed to any wharf subject to special usages in different ports.[8] When goods did not accompany the invoice, they are looked for in the next packet.[9]

1 Blossom v. Smith, 3 Blatchf. 316; Gibson v. Stevens, 3 McLean, 563; Chaplin v. Rogers, 1 East, 192; Atkinson v. Maling, 2 Term. Rep. 462; Higgins v. U. S. M. S. S. Co. 3 Blatchf. 282.

2 Higgins v. U. S. M. S. S. Co. 3 Blatchf. 282.

3 The Glover, 1 Brown Adm. 166; Richardson v. Goddard, 23 How. 28.

4 Richardson v. Goddard, 23 How. 28; Gibson v. Stevens, 3 McLean, 563; Chaplin v. Rogers, 1 East, 192; Atkinson v. Maling, 2 Term Rep. 462.

5 Richardson v. Goddard, 23 How. 28; The Peytona, 2 Curt. 21.

6 The Middlesex, 11 Law Rep. N. S. 14.

7 The Grafton, Olcott, 43; S. C. Abb. Adm. 552, note; Ostrander v. Brown, 15 Johns. 39; Kohn v. Packard, 3 La. 224.

8 The E. H. Fittler, 1 Low. 114.

9 Low v. Andrews, 1 Story, 43; Bryans v. Mix, 4 Mees. & W. 775.

§ 244. Sufficiency of delivery.—The delivery contemplated by the bill of lading is a transfer of the property to the power and possession of the consignee.[1] The goods are regarded as delivered, so far as the carrier's responsibility is concerned, when they are deposited on

5 Salmon Falls Manuf. Co. *v.* The Tangier, 1 Cliff. 398.

6 The Tangier, 3 Ware, 118; Cope *v.* Cordova, 1 Rawle, 203; The Boston, 1 Low. 465; The E. H. Fittler, 1 Low. 115; Norway Plains Co. *v.* Boston & M. R. R. Co. 1 Gray, 271; Hyde *v.* Trent. & M. Nav. Co. 5 Term Rep. 389; Goold *v.* Chapin, 10 Barb. 612; Price *v.* Powell, 3 N. Y. 322; Miller *v.* Steam Nav. Co. 13 Barb. 361; Gatliffe *v.* Bourne, 4 Bing. (N. C.) 314.

7 The Santee, 7 Blatchf. 186.

8 Ellsworth *v.* The Wild Hunter, 2 Woods, 315.

9 Germania Ins. Co. *v.* Lacrosse, 3 Biss. 501.

10 The Grafton, Olcott, 53; Cope *v.* Cordova, 1 Rawle, 203; Gibson *v.* Culver, 17 Wend. 305; Syedes *v.* Hay, 4 Term Rep. 260; Gatliffe *v.* Bourne, 4 Bing N. C. 314.

11 The E. H. Fittler, 1 Low. 115; Ostrander *v.* Brown, 15 Johns. 39; 23 How. 28; Gatliffe *v.* Bourne, 4 Bing. N. C. 314; 3 Man. & G. 643; 7 Ibid. 850; The Boston, 1 Low. 465; Humphreys *v.* Reed, 6 Whart. 435; Hemphill *v.* Chenie, 6 Watts & S. 62; Chickering *v.* Fowler, 4 Pick. 371; Salmon Falls Manuf. Co. *v.* The Tangier, 11 Law Rep. N. S. 6; Wardwell *v.* Nourillyan, 2 Esp. 693; The Boston, 1 Low. 466.

12 The Martha, Blatchf. & H. 162; Dutton *v.* Solomonson, 3 Bos. & P. 582; Dawes *v.* Peck, 8 Term Rep. 330.

13 Ex parte Easton, 95 U. S. 75.

§ 245. Time of delivery.—A delivery to be effectual should not only be at the proper place, usually the wharf, but at the proper time.[1] Where there is no express stipulation as to the time of unloading, an implied promise only arises to discharge in the usual and customary time.[2] The master is entitled to a reasonable time to find out the amount of freight due, yet he has no authority meantime to store the goods at the expense of the owners.[3] Consignees are entitled to a reasonable time to ascertain whether the goods correspond with the description given in shipping documents.[4] What shall constitute a reasonable time for delivery depends on the peculiar circumstances of the case.[5] There is no general usage in commercial law which forbids the unlading of a vessel and the tender of freight on a day set apart for a church feast, fast, or holiday,[6] in the absence of any local statute[7] or usage.[8] Masters are not bound to suspend their work discharging during the several hours when those to whom goods are delivered go to their meals.[9] An offer by the carrier to deliver all the goods within a reasonable time and in proper business hours, at whatever place the owner or shipper may direct, discharges the carrier.[10] The vessel is not bound to land an entire shipment in one day; and if the consignee disregards a notice that it will be landed on different days, and is not present to receive the goods, and has not secured the freight nor made arrangements for *pro rata* payment, the master may store the goods at the risk and expense of the consignee.[11]

1 Richardson v. Goddard, 23 How. 28.

2 The Glover, 1 Brown Adm. 168; The Mary E. Taber, 1 Ben. 106; Philadelphia & R. R. R. Co. v. Northam, 2 Ben. 1; Burmester v. Hodgson, 2 Camp. 488.

3 The Diadem, 4 Ben. 247.

4 Bradstreet v. Heran, Abb. Adm. 209; The Mary Washington, Chase Dec. 125; The Idaho, 93 U. S. 575; The Santee, 7 Blatchf. 186; The Eddy, 5 Wall. 481.

5 Broadwell v. Butler, 6 McLean, 296; S. C. Newb. 171.

6 Richardson v. Goddard, 23 How. 28; Pierson v. Richardson, 1 Cliff. 336; Salmon Falls Manuf. Co. v. The Tangier, 1 Cliff. 398.

7 Pierson v. Richardson, 1 Cliff. 383.

8 Salmon Falls Manuf. Co. v. The Tangier, 1 Cliff. 398.

9 Salmon Falls Manuf. Co. v. The Tangier, 1 Cliff. 398.

10 The Richmond, 1 Biss. 49.

11 Brittan v. Barnaby, 21 How. 527.

§ 246. Demurrage.—Demurrage is only an extended freight or reward to the vessel in compensation of the earnings she is improperly caused to lose.[1] Every improper detention may be considered a demurrage, and compensation in that name be obtained for it,[2] for unnecessary detention in loading[3] and unloading,[4] in the absence of any contract.[5] Where the charterer placed the cargo in the hands of a third party for sale, such third party was held liable, under his agreement to put himself in the place of the charterer, for demurrage specified in the charter party, and additional delay in loading and unloading.[6] Lay days begin to run on the arrival of the vessel at the entrance of her dock or other place of discharge, and not when she has merely reached the port of delivery.[7] Where notice of arrival was given to the consignee, the "lay days" begin to run after the time specified in the bill of lading.[8] Under the terms "dispatch in discharging," the vessel is not obliged to await her turn in respect of other vessels, but is entitled to demurrage for delay in discharging.[9] The consignee cannot alter the terms by evidence of usage.[10] When no "lay days" are provided, the consignee is not liable for delays occurring without his fault,[11] as when they use reasonable diligence to procure the means of unloading,[12] or when causes supervene over which he had no control, as when several vessels arrive together;[13] but where the consignee is in fault the claim may be enforced,[14] as where the carrier was compelled to wait by reason of the berth at the wharf being occupied, and for lack of teams to take the cargo away.[15] Where the bill of lading makes no mention of "lay days," evidence of an oral contract is inadmissible.[16] The lien for demur-

rage is waived by delivery of the cargo and receipt of freight.[17] The owner having abandoned his lien on the cargo for demurrage, cannot maintain an action for damages against the shippers, who were merely agents.[18] The master cannot refuse to sign a draft on the consignees, in pursuance of stipulations in charter party, on the ground that demurrage is due.[19]

1 Sprague v. West, Abb. Adm. 554.

2 The Apollon, 9 Wheat. 362; Sprague v. West, Abb. Adm. 548; The John, 2 Hagg. Adm. 317; Horn v. Bensusan, 9 Car. & P. 709.

3 Sprague v. West, Abb. Adm. 548; The Apollon, 9 Wheat. 362; 6 N. J. Leg. Obs. 303; Horn v. Bensusan, 9 Car. & P. 709; The John, 2 Hagg. Adm. 317; Tons of Guano, 6 Ben. 533.

4 Sprague v. West, Abb. Adm. 548; The Apollon, 9 Wheat. 362; Horn v. Bensusan, 9 Car. & P. 709; The John, 2 Hagg. Adm. 317; Donaldson v. McDowell, 1 Holmes, 290.

5 Horn v. Bensusan, 9 Car. & P. 709.

6 Cain v. Garfield, 1 Low. 484; Kell v. Anderson, 10 Mees. & W. 494; Parker v. Winslow, 7 Ellis & B. 942.

7 Benson v. Hippius, 4 Bing. 455.

8 Choate v. Meredith, 1 Holmes, 500.

9 Keen v. Audenried, 15 Int. Rev. Rec. 91.

10 Philadelphia &c. R. R. Co. v. Northam, 2 Ben. 1.

11 The Glover, 1 Brown Adm. 166; Randall v. Lynch, 12 East, 179; S. C. 2 Camp. 352.

12 Coombs v. Nolan, 7 Ben. 301.

13 Fulton v. Blake, 5 Biss. 371.

14 Donaldson v. McDowell, 1 Holmes, 290.

15 Davis v. Wallace, 3 Cliff. 123; Higgins v. U. S. M. S. S. Co. 3 Blatchf. 282.

16 Higgins v. U. S. M. S. S. Co. 3 Blatchf. 282.

17 Winslow v. Barrels of Salt, 1 Biss. 459.

18 Stafford v. Watson, 1 Biss. 437.

19 Reynolds v. The Joseph, 2 Hughes, 58.

§ 247. Demurrage, when not allowed. — Where the charter party stipulated for payment of demurrage, "provided such detention should happen by default" of the charterer, no demurrage can be recovered for a detention caused by reason of the weather.[1] A stipulation for demurrage after a certain time from arrival, and no notice thereof, does not include detention through the negligence of the master.[2] The carrier is not entitled to demurrage for delay where, on finding he could not discharge for several days, he proceeded to a neighboring port and there discharged.[3] Where the orders of the consignee were beyond the scope of his authority, and delay was occasioned thereby, the charterers are not liable for demurrage.[4] Where the delay was not caused by any default on

the part of the charterer and under his contract, it cannot be charged to him.[6] Where it did not appear that any legal claim existed for demurrage by the vessel chartered, a barge employed to deliver was not liable for delay in making such delivery.[6] The consignee cannot be made liable for demurrage where there is in the charter party or bill of lading no express stipulation in respect to it, or to lay days, without his fault.[7] The lien for demurrage is lost by delivery of cargo and receipt of freight.[8]

1 The Mary E. Taber, 1 Ben. 105; Towle v. Kettell, 5 Cush. 18.

2 Hall v. Eastwick, 1 Low. 456.

3 Strong v. Carrington, 2 Amer. Law Rep. N. S. 287, affirmed; Ibid. 300, note.

4 Hooe v. Groverman, 1 Cranch, 214.

5 The Mary E. Taber, 1 Ben. 106; Sprague v. West, Abb. Adm. 548.

6 The Wilkesbarre C. & I. Co. 5 Ben. 482.

7 The Glover, 1 Brown Adm. 168; Sprague v. West, Abb. Adm. 553; Robertson v. Bethune, 3 Johns. 342; Burmester v. Hodgson, 2 Camp. 488.

8 Winslow v. Barrels of Salt, 1 Biss. 459.

§ 248. Liability of carriers.—A common carrier has two distinct liabilities—one for losses by accident or mistake, where he is liable as insurer; the other for losses by default or negligence, where he is answerable as an ordinary bailee.[1] Carriers, whether consignees or not, are all equally liable;[2] and whether common carriers or not, are all equally liable under a bill of lading.[3] So members of a corporation are equally liable.[4] The liability of the carrier commences when the goods are delivered to him for transportation,[5] and is not ended until the cargo is safely delivered at the port of destination;[6] and in case of continuous routes, until delivered to second carrier,[7] nor until the liability of the succeeding carrier has attached.[8] It is not released by a delivery of part of the cargo.[9] The liability of the owner as carrier is terminated upon the total destruction of the vessel and cargo by a peril excepted in the bill of lading.[10] The liability of the ship as carrier continues till the expiration of a reasonable time after the goods are deposited on the wharf,[11] for damages arising from negligence of ship's agent in taking care of them according to special usages or customs.[12] The customs of trade are to be regarded in determining whether a cause for injury arises from excepted perils or from those dangers for which carriers are liable.[13] The shipment of goods creates an obligation maritime in its character, which may be enforced *in rem* against the vessel.[14]

1 Railroad Co. v. Lockwood, 17 Wall. 363; Dorr v. New Jersey S. N. Co. 11 N. Y. 485; S. C. 4 Sand. 136.

2 The Commander in Chief, 1 Wall. 51.

3 The Commander in Chief, 1 Wall. 51; Clark v. Barnwell, 12 How. 272.

4 Hatch v. Burroughs, 1 Woods, 443; Allen v. Sewall, 6 Wend. 335; S. C. 2 Ibid. 327.

5 Pratt v. Railroad Co. 95 U. S. 43; Rogers v. Wheeler, 52 N. Y. 262; Grosvenor v. N. Y. Cent. R. R. Co. 59 N. Y. 34.

6 King v. Shepherd, 3 Story, 360; Plantamour v. Staples, 1 Term Rep. 611.

7 Railroad Co. v. Manuf. Co. 16 Wall. 327; Michigan R. R. Co. v. Hale, 6 Mich. 243; Mills v. Mich. Cent. R. R. Co. 45 N. Y. 622.

8 Pratt v. R. R. Co. 95 U. S. 43; Ransom v. Holland, 59 N. Y. 611; O'Neil v. N. Y. Cent. R. R. Co. 60 N. Y. 138.

9 Sears v. Bags of Linseed, 1 Cliff. 68.

10 Wattson v. Marks, 2 Amer. Law Reg. 157; N. J. S. N. Co. v. Merchants' Bank, 6 How. 435; The Rebecca, 1 Ware, 188.

11 The St. Laurent, 7 Ben. 7.

12 The Tybee, 1 Woods, 358.

13 Baxter v. Leland, Abb. Adm. 348; Trott v. Wood, 1 Gall. 443; Gordon v. Little, 8 Serg. & R. 533.

14 Knox v. The Ninetta, Crabbe, 538; The George, 1 Sum. 151; Perkins v. Hill, 2 Wood & M. 166; Cock v. Taylor, 13 East, 399; Small v. Moates, 9 Bing. 574. And see *ante*, § 235.

§ 249. As bailee.—Carriers of the results of a whaling voyage are liable, as depositaries, for only ordinary diligence.[1] The owners, as carriers, are liable for the loss of the cargo by theft, embezzlement, sale, or destruction of the cargo by the master or crew, or by a third person,[2] although ordinary diligence was exercised,[3] and though guilty of neither fraud nor fault.[4] Where the goods were embezzled by the crew, the damages were their net value, deducting freight and other charges.[5] Carriers are liable for the actual value of goods withheld or lost, without legal excuse, computed at the time when the goods might have been delivered at the port of destination.[6] They are liable for material consumed by the crew,[7] and for property taken and sold by the master.[8] The owners are liable for the loss of bank-bills, gold, etc., when they hold themselves out as carriers of such for hire.[9] They are liable if the master is authorized to receive them as their agent, and he has been guilty of gross negligence;[10] but when the carriage of money was a personal perquisite of the master, they are not liable as common carriers;[11] nor are they liable for the loss of a package delivered to the purser, who received it as bailee;[12] nor for the loss of a package of great value, surreptitiously introduced to avoid payment for its transportation;[13] nor where gold coin was

surreptitiously introduced;[14] but if they knew the contents, and accepted only a rate chargeable for ordinary baggage, they would be liable.[15] Where a party conceals from the carrier the value of a package, he cannot recover its full value in case of loss.[16] The recovery can only be to the usual value of common merchandise of such bulk.[17] It is sufficient to charge the carrier as to the value of a package, if it be inserted in the bill of lading.[18] The measure of damages for the loss of coin is its value in the port of delivery, with interest, to be estimated in the currency of the country.[19]

1 Joy v. Allen, 2 Wood. & M. 316; Eaton v. Rumney, 13 Wend. 387; Satterlee v. Groat, 1 Wend. 272; Allen v. Sewall, 2 Wend. 327; S. C. 6 Ibid. 335; Walter v. Brewer, 11 Mass. 99; Shackleford v. Wilcox, 9 La. 33; Ward v. Green, 6 Cowen, 173; Tompkins v. Saltmarsh, 14 Serg. & R. 275; Anonymous, 2 Show. 184; Progers v. Frasier, 2 Show. 171; Robinson v. Dunmore, 2 Bos. & P. 417; Beauchamp v. Powley, 1 Moody & R. 38; Brind v. Dale, 8 Car. & P. 207; 2 Moody & R. 80; Baxter v. Rodman, 3 Pick. 435.

2 U. S. v. Morgan, 1 How. 162; King v. Shepherd, 3 Story, 356; U. S. v. Burroughs, 3 McLean, 405; Jordan v. White, 4 La. N. S. 335; Elliott v. Rossell, 10 Johns. 1; Smith v. Shepherd, Abb. on Sh. 252; Sprowl v. Killar, 4 Stew. & P. 382; Watkinson v. Laughton, 8 Johns. 213; Williams v. Branson, 1 Murph. 417; Dale v. Hall, 1 Wils. 281; Gibbon v. Paynton, 4 Burr. 2298; Trent Nav. v. Wood, 3 Esp. 127; Schieffelin v. Harvey, 9 Johns. 170; S. C. 5 Amer. Dec. 206; Morse v. Slue, 1 Vent. 190. And see Rev. Stats. sec. 4283.

3 Joy v. Allen, 2 Wood. & M. 314; Trent & M. Nav. Co. v. Wood, 4 Doug. 287; S. C. 2 Esp. 127; Orange Co. Bk. v. Brown, 9 Wend. 85.

4 King v. Shepherd, 3 Story, 356; Morse v. Slue, 1 Vent. 190, 238; Barclay v. Curculla y Gana, 3 Doug. 389; Trent & M. Nav. Co. v. Wood, 4 Doug. 287; S. C. 2 Esp. 127.

5 The Boston, 1 Low. 469; Watkinson v. Laughton, 8 Johns. 213; Gillingham v. Dempsey, 12 Serg. & R. 183; Arthur v. The Cassius, 2 Story, 81; The Joshua Barker, Abb. Adm. 220; Nourse v. Snow, 6 Me. 208.

6 The Joshua Barker, Abb. Adm. 220; House v. Lexington, 2 N. Y. Leg. Obs. 4; Arthur v. The Cassius, 2 Story, 81.

7 The Gold Hunter, Blatchf. & H. 308; Watkinson v. Laughton, 8 Johns. 213; Morse v. Slue, 1 Vent. 190, 238.

8 The Boston, Blatchf. & H. 330; The Packet, 3 Mason, 255; The American Ins. Co. v. Coster, 3 Paige, 323; Bulgin v. The Rainbow, Bee, 116; The Leonidas, Olcott, 16; Mutual Safe. Ins. Co. v. The George, Olcott, 96; The Hoffnung, 6 C. Rob. 383.

9 Citizens' Bk. v. Nantucket S. Co. 2 Story, 47, explaining Boucher v. Lawson, Hardw. 85; Dwight v. Brewster, 1 Pick. 50.

10 Citizens' Bk. v. Nantucket S. Co. 2 Story, 48; Philadelphia & R. R. R. Co. v. Derby, 14 How. 468. And compare The New World v. King, 16 How. 469.

11 Citizens' Bk. v. Nantucket S. Co. 2 Story, 49; Allen v. Sewall, 2 Wend. 327; S. C. 6 Ibid. 325; Edwards v. Sherrett, 1 East, 604. And see Sheldon v. Robinson, 7 N. H. 157.

12 Suarez v. The George Washington, 1 Woods, 96.

13 Hellman v. Holladay, 1 Woolw. 365.

3 The Zenobia, Abb. Adm. 80; The Roeside, 2 Sum. 571; Williams v. Grant, 1 Conn. 487; Whitesides v. Russell, 8 Watts & S. 44; McArthur v. Sears, 21 Wend. 190.

4 The Gentleman, Olcott, 110; Speyer v. The Mary Belle Roberts, 2 Sawy. 6; Clark v. Barnwell, 12 How. 272; The Juniata Paton, 1 Biss. 17; The Protector, 9 Wall. 687; The Niagara v. Cordes, 21 How. 7; Muddle v. Stride, 9 Car. & P. 380; Hide & Trent. Nav. Co. v. Wood, 3 Esp. 127.

5 Hooper v. Rathbone, Taney, 519.

6 The Keokuk, 1 Biss. 524; King v. Shepherd, 3 Story, 349; Airey v. Merrill, 2 Curt. 8; Bearse v. Ropes, 1 Sprague, 331; The Olbers, 3 Ben. 150; Hunt v. Cleveland, 6 McLean, 76. And compare Lamb v. Parkman, 1 Sprague, 343; The Columbo, 2 Blatchf. 521.

7 Clark v. Barnwell, 12 How. 272; Hunt v. The Cleveland, 1 Newb. 221; 6 McLean, 76; The David and Caroline, 5 Blatchf. 266; Transportation Co. v. Downer, 11 Wall. 129; Dedekam v. Vose, 3 Blatchf. 44; Speyer v. The Mary Belle Roberts, 2 Sawy. 4; Clark v. Barnwell, 12 How. 272; Turner v. The Black Warrior, 1 McAll. 181; Lamb v. Parkman, 1 Sprague, 343.

8 Garrison v. Memphis Ins. Co. 19 How. 315; Singleton v. Hilliard, 1 Strob. 203; Hall v. The Railroad Cos. 13 Wall. 372; Rockingham Mut. Li. and F. Ins. Co. v. Bosher, 39 Me. 253; N. J. S. N. Co. v. Merchants' Bk. 6 How. 425; Hale v. N. J. S. N. Co. 15 Conn. 539; Gilmore v. Carman, 1 Smedes & M. 279; The City of Norwich, 3 Ben. 579; Hollister v. Nowlen, 19 Wend. 234; Hunt v. Morris, 6 Mart. La. 676; Miles v. Cattle, 6 Bing. 419; Lyon v. Mells, 6 How. 419; Grille v. Genl. Iron Screw Co. Law Rep. 1 C. P. 600.

9 N. J. S. N. Co. v. Merchants' Bank, 6 How. 425; King v. Shepherd, 3 Story, 349; Elliott v. Rossell, 10 Johns. 1; Patapsco Ins. Co. v. Coulter, 3 Peters, 222; Toulmin v. Anderson, 1 Taunt. 227, 385; McArthur v. Sears, 21 Wend. 19; Hyde v. Trent & M. Nav. Co. 5 Term Rep. 389.

10 Robinson v. Merch. Disp. T. Co. 45 Iowa, 470.

§ 251. When commences.—The reception of goods by the master or his authorized agent binds the vessel for their safe carriage and delivery.[1] The acceptance is complete when the property comes into his possession with his assent,[2] but a master is not authorized to accept a cargo on behalf of the owner short of the port of delivery.[3] The mere putting of goods on the deck, without delivery to some one on board, is not sufficient;[4] but if the carrier afterward receive the freight, it is a ratification of the shipment.[5] If a common carrier agrees that property intended for transportation may be deposited at a particular place, without express notice to him, such deposit amounts to notice, and is a delivery.[6] If goods are deposited for the purpose of being carried without further orders, the responsibility of the carrier begins from the time they are received; but when they are subject to the further order of the owner, the case is otherwise.[7] A delivery on board a lighter in the employment of the vessel is sufficient to bind the vessel under the terms of a charter party.[8] Delivery ensues when the lighter is towed alongside the vessel and made fast with lines.[9] A delivery to

§ 252. Liability for negligence.—Carefulness, diligence, and fidelity are the essential duties of a carrier, and a failure in these is negligence.[1] Diligence and negligence are not definable,[2] and the distinction between ordinary and gross negligence in a bailee is immaterial.[3] The master as well as the owner of the vessel is personally responsible for his own negligence and misfeasance.[4] So the vessel is also chargeable,[5] as in case of negligent defects in the vehicle,[6] or in running the same,[7] or in taking in and delivering cargo,[8] and stowage of cargo,[9] as for loss by sweating, by neglect to use proper preventive precautions,[10] or by blowing, by water in the hold forced up through the seams of the ceiling, causing injury to the goods.[11] Owners who provide a seaworthy vessel properly equipped and commanded cannot be held liable for mere neglect of the officers,[12] as in case of stowage in bulk;[13] or where goods are consigned to the master for sale and he sells them and neglects to account for the proceeds, no action lies against the ship-owners.[14] Where the damage was attributable partly to the carrier and partly to the shipper, the loss may be equally divided between them.[15] The law does not charge culpable negligence where the usual precautions are taken against accidents which careful and prudent men are accustomed to take under similar circumstances,[16] as where the master had no knowledge nor means of knowledge that articles required extra care.[17] It is not negligence in the carrier not to inquire of the contents of packages; he is not bound under all circumstances to inquire.[18] Where the dangerous character of the article was unknown either to shippers or owners, and no actual fault imputed to either, the damage and expense occasioned must be borne by the shippers.[19]

1 Railroad Co. *v.* Lockwood, 17 Wall. 357. See PILOTAGE, TOWAGE, COLLISION.

2 The New World *v.* King, 16 How. 475; Wyld *v.* Pickford, 8 Mees. & W. 460.

3 Railroad Co. *v.* Lockwood, 17 Wall. 383; Wyld *v.* Pickford, 8 Mees. & W. 460; Philadelphia & C. R. R. Co. *v.* Derby, 14 How. 468; Hinton *v.* Dibbin, 2 Q. B. 646; The New World *v.* King, 16 How. 475; Stanton *v.* Bell, 2 Hawks, 145; Wilson *v.* Brett, 11 Mees. & W. 113; Percy *v.* Millandon, 8 Martin N. S. 68; Shield *v.* Blackburne, 1 H. Black. 161; Tracy *v.* Wood, 3 Mason, 132.

4 White *v.* McDonough, 3 Sawy. 311.

5 The Waldo, 2 Ware, (Dav.) 161; S. C. 4 Law Rep. 382.

6 New Jersey S. N. Co. *v.* Merchants' Bank, 6 How. 430; The Rebecca, 1 Ware, 188; Havelock *v.* Geddes, 10 East, 555; Lyon *v.* Mells, 5 East, 428; Walker *v.* Fletcher, 6 Jur. 4; Sharp *v.* Grey, 9 Bing. 457; Camden & A. R. R. Co. *v.* Burke, 13 Wall. 611; Bretherton *v.* Wood, 3 Brod. & B. 54.

7 New Jersey S. N. Co. v. Merchants' Bank, 6 How. 430; Bretherton v. Wood, 3 Brod. & B. 54.

8 Wilson v. The Belvedere, 1 Pet. Adm. 258; Atkyns v. Burrows, Ibid. 244.

9 Clark v. Barnwell, 12 How. 272; The R. G. Winslow, 4 Biss. 13; Talbot v. Wakeman, 19 How. Pr. 36; Lawrence v. Minturn, 17 How. 100; Muddle v. Stride, 9 Car. & P. 380.

10 Adrian v. The Live Yankee, 23 Hunt's Mer. Mag. 703; Irequist v. Morewood, 39 Ibid. 76.

11 The Wilhelmina, 3 Ben. 112; Bearse v. Ropes, 1 Sprague, 331; The Reeside, 2 Sum. 567.

12 Malone v. Western Transp. Co. 5 Biss. 315.

13 Hooper v. Rathbone, Taney, 519.

14 The Waldo, 2 Ware, (Dav.) 164; Williams v. Nicholls, 13 Wend. 58.

15 Snow v. Carruth, 1 Sprague, 324. And see Bowas v. Pioneer Tow Line, 2 Sawy. 27; Ernst v. Hudson Riv. R. R. Co. 35 N. Y. 1; Brown v. Lynn, 31 Pa. St. 512.

16 Nitro-Glycerine Case, 15 Wall. 537; Pierce v. Winsor, 2 Cliff. 13; Nichols v. DeWolf, 1 R. I 277.

17 Parrott v. Barney, 1 Sawy. 453.

18 Parrott v. Barney, 1 Sawy. 451; Jetter v. N. Y. & H. R. R. Co. 2 Keyes, 154; Earhart v. Youngblood, 27 Pa. St. 331; Deyo v. N. Y. Cent. R. R. Co. 34 N. Y. 9; Curtis v. Mills, 5 Car. & P. 489; Hutchinson v. Guion, 3 Com. B. N. S. 149.

19 Pierce v. Winsor, 2 Cliff. 18.

§ 253. For loss by bad stowage.—The carrier is liable only for the want of reasonable care, skill, and diligence in the stowage of the cargo.[1] Bad stowage only affects the responsibility of the carrier for injury or damage to the cargo caused by it.[2] If the shipper is warned as to the manner of stowage, or if he directs the stowage, he cannot recover for a loss occasioned by such stowage.[3] A contract providing no mode of stowage tacitly refers to the established known usages of the trade,[4] and the general import of a bill of lading that goods are to be stowed under deck does not apply.[5] A usage as to the stowage of the cargo avoids liability for damages,[6] and the shipper is chargeable with notice thereof.[7] Usage and custom as to stowage must be clear and well known to exempt the carrier from damage for injury by contact with other goods.[8] Where there is a notorious custom to stow particular goods in a certain way, shippers must notify their wish to have a different way adopted,[9] or their assent will be deemed given.[10] The shipper takes the risk of perils arising from the place of stowage agreed upon.[11] The carrier can evade liability for damage by contact with other goods by showing proper stowage, secured by dunnage.[12]

1 Bissell v. Mepham, 1 Wool. 225; S. C. 9 Wall. 370.

2 Weston v. Minot, 2 Wood. & M. 450; The Rebecca, 1 Ware, 188; Taunton C.Co. v.Merchants' Ins. Co. 22 Pick. 108; The Reeside, 2 Sum. 567.

3 The Wellington, 1 Biss. 282; Meyer v. White, 32 Eng. Ch. 429.

4 Lamb v. Parkman, 1 Sprague, 343.

5 Chubb v. Bushels of Oats, 16 Law Rep. N. S. 492.

6 Leland v. Parkman, 10 Law Rep. N. S. 186.

7 Baxter v. Leland, 1 Blatchf. 526; S. C. Abb. Adm. 348.

8 The Fanny Fosdick, 4 Blatchf. 375; Lamb v. Parkman, 1 Sprague, 354; The Bark Cheshire, 2 Sprague, 30; Baxter v. Leland, Abb. Adm. 348; S. C. 1 Blatchf. 526.

9 Baxter v. Leland, Abb. Adm. 348; 1 Blatchf. 526. Compare The Reeside, 2 Sum. 567; Sabbich v. Prince, not reported.

10 Baxter v. Leland, 1 Blatchf. 526; S. C. Abb. Adm. 348; The Invincible, 1 Low. 228; Clark v. Barnwell, 12 How. 272.

11 Lawrence v. Minturn, 17 How. 100.

12 Baxter v. Leland, Abb. Adm. 358; The Reeside, 2 Sum. 567.

§ 254. For loss by leakage and breakage.—Notwithstanding the bill of lading contains exceptions as to leakage, breakage, and rust, the carrier is nevertheless responsible for negligence or want of skill in lading, storage, and deliverance of cargo; but these must be affirmatively shown.[1] He is held accountable for leakage arising from failure to comply with the express stipulations on the bill of lading,[2] and for leakage caused by defective storage;[3] but not when the leakage was by reason of secret defects in the packages,[4] nor by causes connected with the nature of the article.[5] Injury by seepage of water through the deck is not within the exception of dangers of the seas.[6] When the loss occurred by springing a leak, while the vessel was at anchor, the owner must show it was from some stress of weather, or other circumstance sufficient to discharge from liability.[7] Where the damage was caused by leakage through the deck, the carrier must show that a peril of the sea caused the leak, not that it might have caused it.[8] He must negative causes which would leave him liable.[9] The first duty of a master on stranding, by which the vessel is made leaky, is to take all possible care of the cargo, and the burden of proof is on him to bring himself within the exception referring to injuries;[10] but the burden of proof of negligence, in case of loss by leakage or breakage, is on the shipper.[11] Where goods were properly stowed with reference to their character and apparent condition, the vessel is not liable for breakage, and may hold all the goods till full freight is paid.[12] The liability of the carrier for damage by leakage is not evaded by surrendering his interest in the vessel.[13]

1 The Invincible, 1 Low. 225; The Delhi, 4 Ben. 345.

2 Hunnewell v. Taber, 2 Sprague, 1. See *ante*, § 225.

3 The Newark, 1 Blatchf. 203; Baxter v. Leland, Abb. Adm. 348.

4 Nelson v. Woodruff, 1 Black, 156; Clark v. Barnwell, 12 How. 272; Warden v. Greer, 6 Watts, 424; The Orifiamme, 1 Sawy. 181; The Live Yankee, Deady, 420. See *ante*, § 225.

5 Nelson v. Woodruff, 1 Black, 156.

6 The Antoinetta C. 5 Ben. 565; The Reeside, 2 Sum. 567; Bearse v. Ropes, 1 Sprague, 331; Moses v. Boyd, 5 Blatchf. 357.

7 Harvey v. The Vivid, 14 Int. Rev. Rec. 163; The Compta, 4 Sawy. 375.

8 The Compta, 4 Sawy. 375.

9 The Emma Johnson, 1 Sprague, 527; Bearse v. Ropes, Ibid. 331.

10 The Ocean Wave, 3 Biss. 317; The Keokuk, 1 Biss. 322; Clark v. Barnwell, 12 How. 272; King v. Shepherd, 3 Story, 349.

11 The Delta, 4 Ben. 347; The David and Caroline, 5 Blatchf. 266; Dedekam v. Vose, 3 Blatchf. 44; Vaughan v. Casks of Sherry, 7 Ben. 509.

12 Vitrified, etc., Sewer Pipes, 5 Ben. 405.

13 Matter of Sinclair, 8 Am. Law Reg. 206. And see Rev. Stats. sec. 4285.

§ 255. For non-delivery.—The carrier who receives property to transport, and does not deliver it, is held *prima facie* liable.[1] The owners of a steamboat regularly employed in running from one port to another for the conveyance of passengers and merchandise, are liable not only for their own acts, but for those of their agents or servants, as common carriers, for failure to deliver property intrusted to them for transportation.[2] To charge the carrier for non-delivery some evidence of non-delivery must be given.[3] Where the master, on being driven ashore by perils of the sea, sold portions of the cargo to pay salvage claims, the vessel was not liable for non-delivery.[4] Where the owner abandoned the cargo to the insurer, and the insurer took possession and sold the goods, the carrier was not held liable to deliver;[5] nor where the agent of the owners of the cargo sold the same at an intermediate port.[6] The carrier is held responsible for the number of bushels for which the bill of lading was given;[7] but if no bill of lading be taken, the shipper must prove the amount delivered to the carrier.[8] The rule by which damages are assessed against a carrier for goods lost through ignorance or want of skill, is their net value at the port of delivery, and in case there is no known or market value, then the original cost and charges and interest for the time necessary to procure such articles is the measure, but not the speculative or probable profits.[9]

1 New Jersey S. N. Co. *v.* Merchants' Bank, 6 How. 423; Colt *v.* Mechen, 6 Johns. 160; Watkinson *v.* Laughton, 8 Johns. 213; Brooke *v.* Pickwick, 4 Bing. 218; S. C. 12 J. B. Moore, 447; The Zenobia, Abb. Adm. 48; The Matilda A. Lewis, 5 Blatchf. 520; The Grafton, Ibid. 173; The Huntress, 2 Ware, (Dav.) 82; S. C. 4 West. L. J. 38; Morse *v.* Slue, 1 Vent. 190, 238; Hyde *v.* Trent. & M. Nav. 5 Term Rep. 389.

2 The Huntress, 2 Ware, (Dav.) 82; S. C. 4 West. L. J. 38; 4 Hunt's Mer. Mag. 83.

3 The Falcon, 3 Blatchf. 64.

4 The Wiley Smith, 6 Ben. 195.

5 The Mohawk, 8 Wall. 153.

6 Winterport G. & Co. *v.* The Jasper, 1 Holmes, 99.

7 Creighton *v.* The Georges Creek, 5 Pitts. L. J. 13.

8 Manning *v.* Hoover, Abb. Adm. 188.

9 Bazin *v.* Richardson, 10 Law Rep. N. S. 129; S. C. 5 Am. Law Reg. 459. And see The Joshua Barker, Abb. Adm. 219; Amory *v.* McGregor, 15 Johns. 24; Bracket *v.* McNair, 14 Johns. 170; Watkinson *v.* Laughton, 8 Johns. 213; Gillingham *v.* Dempsey, 12 Serg. & R. 183.

§ 256. For delay in delivery.—The vessel is chargeable with damages occasioned by the delay in delivering the goods, and diminution in value is properly chargeable as an item,[1] and for damages sustained by delay in presenting the manifest to the officers of customs, thereby causing delay in delivery.[2] Where the ship was detained in quarantine the carrier will be liable for the expense of lighterage in conveying the goods to the warehouse wharf pursuant to contract.[3] The measure of damages for delay in delivery is the difference in the market value at the time of the delivery and the time when the goods should have been delivered.[4] By a bill of lading expressing that the goods are to be carried from one port to another a direct voyage is *prima facie* intended, but this presumption may be controlled by a usage to stop at intermediate ports, or by personal knowledge on the part of the shipper that such a course is to be pursued.[5]

1 The City of Dublin, 1 Ben. 56; Nelson *v.* Lancashire & Y. R. M. Co. 9 J. Scott. N. S. 632; Kent *v.* Huds. Riv. R. R. Co. 22 Barb. 278. *Contra*, Jones *v.* N. Y. & Erie R. R. Co. 29 Barb. 633.

2 The Zenobia, Abb. Adm. 80. And see Rev. Stat. sec. 4356.

3 Leland *v.* Agnew, 31 Hunt's Mer. Mag. 456.

4 Page *v.* Munro, 1 Holmes, 233; The Success, 7 Blatchf. 551. And see CHARTER PARTY, § 216.

5 Thatcher *v.* McCulloh, Olcott, 371; Kettell *v.* Wiggin, 13 Mass. 68; Lowry *v.* Russell, 8 Pick. 360.

§ 257. For misdelivery.—The carrier is liable for any loss caused by a delivery to a wrong person,[1] even if by mistake or imposition,[2] but not when the goods were merely carried away by some person not entitled to them.[3] He is responsible for the mistake of his clerk in the mis-

delivery of the goods.[4] He is not discharged from responsibility to deliver to the proper party by negligence of the owner in marking and entering the same in the books of the carrier.[5] Damages for the non-delivery of goods by delivery at the wrong wharf is the value of the goods, less the freight and charges, although freight has not been earned.[6] It is incumbent on the carrier to show that missing goods were discharged upon the wharf and placed with the rest of the consignee's goods.[7] The fact that the indorser of a bill of lading was unknown does not excuse a misdelivery.[8] When the consignor is known to be the owner the carrier must be understood to contract with him only, and consignees are regarded simply as agents,[9] and the carrier will be liable to the shipper for the value of goods delivered to a third person on the order of the consignee at the place of shipment.[10] If the carrier is content to assume the burden of proving another to be the true owner, he should be discharged of his contract to deliver to the true owner.[11]

1 Bonney *v.* The Huntress, 4 Hunt's Mer. Mag. 83; S. C. 2 Ware, (Dav.) 82.

2 The Ben Adams, 2 Ben. 449; The Huntress, 2 Ware (Dav.) 82; The Santee, 2 Ben. 523.

3 Bonney *v.* The Huntress, 4 Hunt's Merch. Mag. 83. And compare The Thames, 7 Blatchf. 226.

4 The Ben Adams, 2 Ben. 445.

5 Bonney *v.* The Huntress, 4 West. Law J. 38; S. C. 4 Hunt's Merch. Mag. 83.

6 The Boston, 1 Low. 464.

7 Carey *v.* Atkins, 6 Ben. 562.

8 The Thames, 14 Wall. 98; 7 Blatchf. 226; 3 Ben. 279.

9 Southern Express Co. *v.* Dixon, 94 U. S. 549, distinguishing Thompson *v.* Fargo, 49 N. Y. 185.

10 Southern Express Co. *v.* Dixon, 94 U. S. 549.

11 The Idaho, 11 Blatchf. 220; Bassett *v.* Spofford, 45 N. Y. 387; Bliven *v.* Hudson Riv. R. R. Co. 36 N. Y. 403; Sheridan *v.* New Quay Co. 4 Com. B. N. S. 618; Rogers *v.* Weir, 34 N. Y. 463; Finlay *v.* Liverpool and G. W. S. S. Co. 23 L. T. 251.

§ 258. Burden of proof in case of loss or damage. When loss or damage is established, the presumption of law is that it was occasioned by the fault of the carrier, and the burden is on him to show that it was occasioned by a cause for which he is not responsible;[1] that it was occasioned by one of the perils from which he is exempted in the contract of shipment or bill of lading;[2] or to show that it arose from a cause existing before the receipt of the goods;[3] but this legal presumption cannot affect third parties.[4] As soon as the carrier has established the dam-

portation Co. v. Downer, 11 Wall. 129; Union Ins. Co. v. Shaw, 2 Dill. 23; Lamb v. Parkman, 1 Sprague, 354; Clark v. Barnwell, 12 How. 272; The Colonel Ledyard, 1 Sprague, 539; Casks of Sherry Wine, 7 Ben. 509; Dedekam v. Vose, 3 Blatchf. 44, 77; The David and Caroline, 5 Blatchf. 266; The Delhi, 4 Ben. 345; The Rocket, 1 Biss. 354; Hart v. Allen, 2 Watts, 118.

6 The Live Yankee, Deady, 422, explaining Clark v. Barnwell, 12 How. 272.

7 The Invincible, 1 Low. 226; Nelson v. Woodruff, 1 Black, 156.

8 Soule v. Rodocanachi, Newb. 504.

9 Dibble v Morgan, 1 Woods, 411; Whitesides v. Russell, 8 Watts & S. 44; Johnson v. Friar, 4 Yerg. 43.

10 Edwards v. The Catawba, 14 La. An. 224.

11 Bernardon v. Nolte, 7 Mart. 278; The Martha, Olcott, 143; The Wilhelmina, 3 Ben. 110.

12 Knox v. The Ninetta, Crabbe, 534.

13 Citizens' Bank v. Nantucket S. Co. 2 Story, 16; King v. Lenox, 19 Johns. 235.

14 Carey v. Atkins, 6 Ben. 562.

15 McCready v. Holmes, 6 Am. Law. Reg. 229.

16 Bell v. Reed, 4 Binn. 127; S. C. 5 Amer. Dec. 398.

§ 259. Liability under excepted perils.—The exceptions in the bill of lading do not cover losses by negligence or want of skill on the part of the carrier.[1] Ordinary diligence is all that is required of the carrier to avoid or remedy the effects of an overpowering cause.[2] The measure of care against accidents is that which a person of ordinary prudence would use if his own interests were to be affected and the whole risk were his own.[3] The master is bound to such precautions as he would foresee were necessary under all the circumstances.[4] Any act or omission on the part of the master or crew, contributing to the loss, takes away the protection of the defense that the loss was occasioned by the act of God.[5] The act of God which would excuse a carrier must be the immediate and not the remote cause of the loss.[6] A failure to bestow the care and skill which the situation demands, is negligence,[7] as in the case of a dense fog.[8] A master may enter a harbor on a dark night, with a heavy sea and high wind, notwithstanding access be difficult, but not unusually dangerous and difficult, without the imputation of negligence.[9] Where a bill of lading contains an exception for loss from perils of the sea or from negligence, the questions of liability depend on whether the implied warranty of seaworthiness at the commencement of the voyage had been complied with.[10] Where the negligence of the carrier exposes goods to injury, by an excepted peril, he must respond in damages.[11] In cases of doubt, negligence is a question of fact.[12]

1 Dedekam *v.* Vose, 3 Blatchf. 44. And see *ante*, § 223.

2 Holladay *v.* Kennard, 12 Wall. 259; Railroad Co. *v.* Reeves, 10 Wall. 176.

3 The Nitro-Glycerine Case, 15 Wall. 538; Todd *v.* Cochell, 17 Cal. 97; Wolf *v.* St. Louis Ind. Wat. Co. 10 Cal. 541.

4 The Tan Bark Case, 1 Brown Adm. 155; Clark *v.* Barnwell, 12 How. 272; Bowman *v.* Teall, 14 Wend. 215.

5 Dibble *v.* Morgan, 1 Woods, 412; The Zenobia, 1 Abb. Adm. 80; S. C. Ibid. 95. And see *ante*, § 223.

6 King *v.* Shepherd, 3 Story, 356; Campbell *v.* Morse, 1 Harp. (S. C.) 468; Schieffelin *v.* Harvey, 6 Johns. 169.

7 Railroad Co. *v.* Lockwood, 17 Wall. 383; Beal *v.* South Devon Railway, 3 Hurl. & C. 337; Wyld *v.* Pickford, 8 Mees. & W. 460; Hinton *v.* Dibbin, 2 Q. B. 646; Wilson *v.* Brett, 11 Mees. & W. 113; Grill *v.* Genl. Iron Screw Co. Law Rep. 1 C. P. 600; Philadelphia, etc. Railroad Co. *v.* Derby, 14 How. 468; The New World *v.* King, 16 How. 474; McClures *v.* Hammond, 1 Bay, 99; S. C. 1 Amer. Dec. 598; Juniata Paton, 1 Biss. 17; Clark *v.* Barnwell, 12 How. 272; McArthur *v.* Sears, 21 Wend. 190. And see *ante*, § 223.

8 The Rocket, 1 Biss. 354.

9 The Juniata Paton, 1 Biss. 15.

10 Steel *v.* State Line S. S. Co. 3 App. Cas. 72.

11 The Tan Bark Case, 1 Brown Adm. 155; Lemler *v.* The Commissioners of Immigration, 1 Hilt. 244; Bowman *v.* Teall, 14 Wend. 215; Clark *v.* Barnwell, 12 How. 272; New Jersey S. N. Co. *v.* Merchants' Bank, 6 How. 344.

12 Railroad Co. *v.* Stout, 17 Wall. 665; Detroit & M. R. R. Co. *v.* Van Steinberg, 17 Mich. 99; Langhoff *v.* Milwaukee, etc. R. R. Co. 19 Wis. 489; Christy *v.* White, 21 Pick. 256; The New World *v.* King, 16 How. 474; Storer *v.* Gowen, 18 Me. 174; Rindge *v.* Coleraine, 11 Gray, 159; Pfau *v.* Reynolds, 53 Ill. 212; Renwick *v.* N. Y. Cent. R. R. Co. 36 N. Y. 132; Quimby *v.* Vermont Cent. R. R. Co. 23 Vt. 387.

§ 260. Limitation of liability by contract.—The carrier may limit his common-law liability, but there must be an express agreement, not a mere notice;[1] but not when such exemption is not just and reasonable in the eyes of the law.[2] He cannot exempt himself from the duty to exercise ordinary care and prudence in the transportation of the goods;[3] nor from responsibility for negligence, especially in the case of the carriage of passengers;[4] nor from loss or damage caused by his own malfeasance, misfeasance, or negligence;[5] nor from the consequences of his own fault or that of his agents or servants.[6] By such a contract the freighter agrees that as to this particular transaction the carrier is not to be regarded as in the exercise of a public employment beyond that of an ordinary bailee for him, and answerable only for misconduct or negligence.[7] The words in a bill of lading, "not accountable for contents," do not constitute an agreement for exemption from liability,[8] but an agreement that unless demand for deficiency be made within three days, and for loss

St. 208; Kitzmiller v. Van Rensselaer, 10 Ohio St. 63; Illinois Cent. R. R. Co. v. Morrison, 19 Ill. 136; Western T. Co. v. Newhall, 24 Ill. 466; Lowe v. Booth, 13 Price, 329.

11 Van Schaack v. Northern T. Co. 3 Biss. 394; N. J. S. N. Co. v. Merchants' Bank, 6 How. 430; Hunt v. Morris, 6 Mart. 676.

12 Railroad Co. v. Manuf. Co. 16 Wall. 330; McMillan v. M. S. & N. I. R. R. Co. 16 Mich. 88.

13 Railroad Co. v. Harris, 12 Wall. 85; Bissell v. Michigan S. & N. I. R. R. Co. 22 N. Y. 285.

§ 261. Restriction of liability by notice.—A common carrier may, by notices brought home to the knowledge of the shipper at the time of the delivery to the carrier, if assented to by the shipper, restrict his responsibility,[1] or qualify it,[2] but the notice must be specific,[3] and must be expressly brought home to the shipper's knowledge.[4] He may restrict his liability by notice of usage.[5] But he cannot limit his liability so as to exonerate him from responsibility for his own negligence or misfeasance, or that of his servants or agents.[6] Notices of exemption, as "all baggage at the risk of the owner," and on the bill of lading, "this company will not be responsible for injury by fire, nor for goods lost, stolen, or damaged," are unavailing, as against public policy.[7] Where special notice has been given, the burden of proof is on the shipper to show negligence.[8] The proper course of proceeding for obtaining the benefit of the act of Congress is for the owners, when libelled for damages, to file a petition for apportionment of the same, and pay into court or give stipulation for such sum as the court may find, or surrender ship and freight by assignment to a trustee, as pointed out in the statute.[9]

1 Earnest v. The Express Co., 1 Woods, 573; Farmers' & M. Bank v. Champlain T. Co. 23 Vt. 186. And see *ante*, § 260, note 3.

2 Hopkins v. Westcott, 6 Blatchf. 66; Orange Co. Bank v. Brown, 9 Wend. 85.

3 Hopkins v. Westcott, 6 Blatchf. 69; Brooke v. Pickwick, 12 J. B. Moore, 447.

4 Hopkins v. Westcott, 6 Blatchf. 69; Brooke v. Pickwick, 12 J. B. Moore, 447; Railroad Co. v. Harris, 12 Wall. 85; Najac v. Boston & L. R. C. 7 Allen, 329.

5 Baxter v. Leland, Abb. Adm. 359, restricting and qualifying the severity of the rule in Cole v. Goodwin, 19 Wend. 251; Clark v. Faxton, 21 Wend. 353; Hollister v. Noolen, 19 Wend. 234; Powell v. Myers, 26 Wend. 591; McArthur v. Sears, 21 Wend. 190. And see Citizens' Bank v. Nant. S. Co. 2 Story, 17; King v. Shepherd, 3 Story, 349; Riley v. Home, 5 Bing. 217, and citing Everleigh v. Sylvester, 2 Brev. 178; Stokes v. Saltonstall, 13 Pet. 181; Farmers' & Mech. Bank v. Champlain Transp. Co. 16 Vt. 52; S. C. 18 Vt. 131; 23 Vt. 186; Boyce v. Andrews, 2 Pet. 150; Maury v. Talmadge, 2 McLean, 157.

6 Walker v. Transportation Co. 3 Wall. 150; School District v. Boston &c. R. R. Co. 103 Mass. 552; Railroad Co. v. Manuf. Co. 16 Wall. 318; Railroad Co. v. Pratt, 22 Wall. 134; Express Co. v. Caldwell, 21 Wall.

corporation is privity or knowledge of the corporation.[6] When the vessel is altogether seaworthy, and the loss occurs from the subsequent negligence of the master or crew, the owner's liability is within the limitation prescribed by statute.[7] The provisions of the statute do not apply to owners of canal-boats, barges, or lighters, or to vessels used in the navigation of rivers or inland waters.[8]

1 The Whistler, 2 Sawy. 349; Walker v. Transportation Co. 3 Wall. 150; Moore v. Amer. Trans. Co. 24 How. 1; Barnes v. S. C. Co. 25 Leg. Int. 196. And see Rev. Stats. secs. 4282, 4287.

2 Lord v. Goodall N. & P. S. Co. 4 Sawy. 300; Norwich Co. v. Wright, 13 Wall. 121; Moore v. American T. Co. 24 How. 39; Walker v. Transportation Co. 3 Wall. 150; Allen v. Mackay, 1 Sprague, 219; The City of Norwich, 1 Ben. 89. And see Rev. Stats. secs. 4283–4285.

3 Lord v. Goodall N. & P. S. Co. 4 Sawy. 300. And see Rev. Stats. sec. 4283.

4 Walker v. Transportation Co. 3 Wall. 153; Lord v. Goodall N. & P. S. Co. 4 Sawy. 301; Hill Manuf. Co. v. Providence & N. Y. S. Co. 113 Mass. 499; Moore v. Amer. Trans. Co. 24 How. 1.

5 Lord v. Goodall N. & P. S. Co. 4 Sawy. 301.

6 Philadelphia &c. R. R. Co. v. Quigley, 21 How. 202; Lord v. Goodall N. & P. S. Co. 4 Sawy. 301; Hill Manuf. Co. v. Providence & N. Y. S. Co. 113 Mass. 500.

7 Lord v. Goodall N. & P. S. Co. 4 Sawy. 292.

8 The Niagara v. Cordes, 21 How. 26; Moore v. Transportation Co. 24 How. 1. And see Rev. Stats. sec. 4289.

§ 263. Carrier, when not liable.—The carrier is not liable for goods shipped without a bill of lading,[1] nor for goods included in a bill of lading, which were never received on board.[2] He is not liable for damage to a cargo of a perishable nature, caused by delay in the voyage.[3] Where the goods were liable to decay, and were not shipped in good order, the carrier will not be liable for damage.[4] If damage has proceeded from an intrinsic principle of decay inherent in the commodity, whether active in every situation or only in the confinement and closeness of the ship, the merchant must bear the loss, and pay the freight,[5] as in case of loss from fermentation,[6] or from brittleness.[7] A carrier will not be liable for damage arising from the nature of the voyage, and usual mode of stowage, although a different mode might have avoided the damage;[8] nor if the loss result from the act of the owner of the goods,[9] as where a stevedore as agent of shippers discharges the cargo, and injury results from the discharging.[10] The carrier is not liable for loss when no blame was attributable to him,[10] as in case of inevitable accident,[11] by grounding.[12] Unless the carrier assumes the risk of all contingencies, he is not liable because he fails to perform what is rendered impossible.[13] In the

absence of negligence or unskillfulness, a carrier should not be held liable for loss of the contents of a barge broken into by a sunken log or stump,[14] or by a collision.[15] But carriers may be liable for loss arising from inevitable necessity, if guilty of previous negligence or misconduct occasioning the loss.[16] Where articles are usually taken in mixed cargoes the shipper must bear the loss if the stowage was good.[17] When goods are stowed on deck with the consent of the shippers, no loss by justifiable jettison is recoverable, unless the accident would have been equally fatal had they been stowed under deck;[18] but it is otherwise if the peril is directly attributable to the want of diligence or skill of the master or crew,[19] or insufficiency of the crew.[20] Where every precaution is taken which is usual and customary in the transportation of a cargo of wheat in bulk, the owners cannot be charged with loss or damage.[21] Where goods were damaged in great part by the fault of the carrier, and in some part, but to what extent cannot be shown, by perils of the sea, the carrier will not be liable for the whole loss.[22] Where the shipper assumes the perils of the sea, the owner to receive a share of the profits in lieu of freight, any loss is to be deducted out of the profits, and be sustained by the owner and freighter jointly.[23] Shippers cannot claim indemnity for injury to the cargo by a storm to which it was exposed while being conveyed to its place of storage.[24]

1 The Island Queen, 1 Brown Adm. 279.

2 The Freeman *v.* Buckingham, 18 How. 182; Vandewater *v.* Mills, 19 How. 82; S. C. McAll. 9; The Pauline, 1 Biss. 397; The Lady Pike, 2 Biss. 145; The Mollie Mohler, 2 Biss. 508; The Delaware, 14 Wall. 602; Edwin *v.* Naumkeag S. C. Co. 1 Cliff. 328; Bulkley *v.* Naumkeag S. C. Co. 24 How. 392, distinguishing Grant *v.* Norway, 2 Eng. L. & E. 337; The Joseph Grant, 1 Biss. 196; The Loon, 7 Blatchf. 246; Coleman *v.* Riches, 16 Com. B. 104; S. C. 29 Eng. L. & E. 323; Amies *v.* Stevens, 1 Strange, 128; Meyer *v.* Dresser, 16 Com. B. N. S. 646; Zipsy *v.* Hill, 1 Fost. & F. 570.

3 The Collenburg, 1 Black, 170.

4 The Howard *v.* Wiseman, 18 How. 231.

5 Clark *v.* Barnwell, 12 How. 282; Sheels *v.* Davies, 4 Camp. 119; Sewer Pipes, 5 Ben. 405; Shields *v.* Davis, 6 Taunt. 65; Davidson *v.* Gwynne, 12 East, 381; The Casco, 2 Ware, 192; Lyons *v.* Mells, 5 East, 428.

6 Nelson *v.* Woodruff, 1 Black, 161; Farrar *v.* Adams, Bull. N. P. 69.

7 Sewer Pipes, 5 Ben. 405; Clark *v.* Barnwell, 12 How. 272.

8 Lamb *v.* Parkman, 10 Law Rep. N. S. 186; Baxter *v.* Leland, 1 Blatchf. 526.

9 Choate *v.* Crowninshield, 3 Cliff. 184.

10 Westray *v.* The Miletus, 5 Blatchf. 335; S. C. 2 Int. Rev. Rec. 61; Clark *v.* Barnwell, 12 How. 272; The New Jersey, Olcott, 444; The Lady Pike, 2 Biss. 145; Colt *v.* McMechen, 6 Johns. 160; Amies *v.* Stevens, 1 Strange, 128.

11 The New Jersey, Olcott, 448; Railroad Co. v. Reeves, 10 Wall. 191; Williams v. Grant, 1 Conn. 487; Denny v. N. Y. Cent. R. R. Co. 13 Gray, 481; The Lady Pike, 2 Biss. 145; Amies v. Stevens, 1 Strange, 128; The Mollie Mohler, 2 Biss. 508.

12 Levy v. The Great Republic, 2 Woods, 33.

13 Reed v. U. S. 11 Wall. 606; The Eliza, 2 Ware, (Dav.) 316.

14 The Favorite, 2 Biss. 502.

15 The New Jersey, Olcott, 444.

16 Speyer v. The Mary Belle Roberts, 2 Sawy. 5; Williams v. Grant, 1 Conn. 487.

17 Clark v. Barnwell, 12 How. 272; Rich v. Lambert, Ibid. 347; Lamb v. Parkman, 1 Sprague, 343; The Colonel Ledyard, Ibid. 530; Dusar v. Murgatroyd, 1 Wash. C. C. 13.

18 Lawrence v. Minturn, 17 How. 100; The Delaware, 14 Wall. 604; The Wakeful, 1 Brown Adm. 474; The Paragon, 1 Ware, 328; The Waldo, 2 Ware, 161; The Wellington, 1 Biss. 280; Dodge v. Bartol, 5 Me. 286; Wolcott v. Eagle Ins. Co. 4 Pick. 429; The Rebecca, 1 Ware, 188; Adams v. Warren Ins. Co. 22 Pick. 163; Gould v. Oliver, 4 Bing. N. C. 142; Smith v. Wright, 1 Caines, 43. And see GENERAL AVERAGE.

19 The Paragon, 1 Ware, 322; Triplet v. Van Name, 2 Cranch C. C. 332; The Jenny Jones, Deady, 82.

20 The Ethel, 5 Ben. 154.

21 Hooper v. Rathbone, Taney, 519.

22 Speyer v. The Mary Belle Roberts, 2 Sawy. 1.

23 Putnam v. Wood, 3 Mass. 481; S. C. 3 Amer. Dec. 179.

24 The Grafton, Olcott, 50, distinguishing Cope v. Cordova, 1 Rawle, 203.

§ 264. Remedy for loss or damage.—The person having the right of property and the right of possession, whether consignor or consignee, may sue for loss or damage to goods.[1] A carrier will be liable to a vendee under a contract made with the vendor.[2] If, after the right of action attaches, the ship be lost, it will not affect the right to recover in case of a tort.[3] The charterer who puts the vessel up as a general ship is liable to the owners for damage which the owner has to pay other shippers for injury to goods by contact with goods of charterer, notwithstanding neither shipper nor owners had any knowledge of the character of the goods.[4] On an agreement that the master may be interested in the profit or loss of the shipment, he has no special or general property in the goods.[5] The master may recover damages for injury to the cargo as a common carrier.[6] He may retain the freight received by him against the owner or his assignee as a general creditor.[7] In the absence of an express application by the ship-owner, freight-money received by a consignee is deemed to be applied to the discharge of liens on the ship.[8] The freighter has his remedy in damages for a short delivery.[9] Freighters cannot be compelled to give bail for the value of a cargo seized.[10] The indorsee

18 Low v. De Wolf, 8 Pick. 101.

19 Forrestier v. Bordman, 1 Story, 43; S. C. 2 Law Rep. 325.

20 Simonds v. Union Ins. Co. 1 Wash. C. C. 443.

OF PASSENGERS.

§ 265. Duties and liabilities of passenger carriers.—The carrier of passengers is held to the obligations of competent skill, and, as far as care and foresight can go, to transport the passengers safely.[1] The greatest possible care and diligence is exacted from carriers employing the agency of steam, and any negligence is deemed gross negligence.[2] It is their duty to employ a competent number of experienced and skillful engineers, or they will be responsible for all damages by explosion of the boiler or the derangement of the machinery.[3] The proviso of the act of Congress in relation to steamers carrying passengers was not intended to disqualify aliens from becoming engineers.[4] They are excused only by the force of inevitable accident.[5] They are bound to the utmost care in providing proper means of approaching the vessel, and of ascending to or descending from it.[6] Where the master committed an error of judgment in supplying the vessel, it was not of such a gross character as to make him personally responsible.[7]

1 Stokes v. Saltonstall, 13 Peters, 181; Christie v. Griggs, 2 Camp. 79; Saltonstall v. Stockton, Taney, 11; Charge to the Grand Jury, Newb. 323.

2 The New World v. King, 16 How. 469; Railroad Co. v. Lockwood, 17 Wall. 374; Philadelphia &c. R. R. Co. v. Derby, 14 How. 468.

3 Charge to the Grand Jury, Newb. 323.

4 Engineers of American Steamships, 11 Opin. Att. Genl. 488.

5 The Oriflamme, 3 Sawy. 397.

6 The Anglo-Norman, 4 Sawy. 185.

7 Marshall v. Crawford, 4 Sawy. 37. And see Rev. Stats. secs. 4260-4262.

§ 266. Obligations of steam vessels.—The Act of Congress of July 7th, 1838, 5 Stat. at Large, 304, prohibits vessels from carrying passengers without a license,[1] and a steam vessel usually employed as a tow-boat, but engaged on one occasion in the transportation of passengers for pay, is liable to the penalty imposed.[2] The act of Congress requiring owners or masters of steam vessels to keep two copies of the official synopsis of the passenger laws conspicuously posted, is imperative.[3] Under the act of Congress which prohibits steamboats from carrying hay, etc., unless protected by a proper covering, the protection

by a tier of grain sacks is a sufficient compliance with the act.[4] Omission to comply with the act of Congress making it the duty of the carrier to provide fire-engines and hose, is gross negligence.[5] The object of the act of Congress imposing a penalty for navigating without inspection of hull and boilers, was to better provide for security of the lives of passengers.[6] Under the act, the bursting of the boiler on a steamboat is *prima facie* evidence of negligence.[7] The act does not apply to vessels navigating waters exclusively within the State.[8] Where a steamer was not shown to be engaged in inter-State commerce, she was not liable to the penalty for neglect to provide life preservers, etc., and to have her boiler inspected.[9] Steamers used on a ferry between different States, are within the purview of the act which exempts ferry-boats, tugboats, towing boats, etc.[10] An action of debt lies against a steamer for the penalty provided by statute for carrying petroleum on passenger vessels.[11] A sea-going steamer, while navigating any of the waters of the United States, is required to be in charge of a licensed pilot.[12] A propeller usually employed as a tug-boat about a harbor may carry passengers without a license while employed in its legal business of towing.[13] The provisions of the act requiring a supply of pumps, life preservers, etc., apply to steam vessels which actually carry passengers, although not usually engaged in that business.[14] The penalty is alone for the transportation of passengers, and not goods and merchandise.[15] The penalty under the act of Congress which forbids a steamer engaged in carrying passengers from carrying as freight any burning and explosive fluid cannot be recovered by a proceeding *in rem*, but by an action of debt.[16]

1 U. S. *v.* The Echo, 20 How. Pr. 517; U. S. *v.* The Ottawa, Newb. 536. See Rev. Stats. sec. 4274.

2 U. S. *v.* The Echo, 4 Blatchf. 446.

3 The Lewellen, 4 Ben. 156. And see Rev. Stats. sec. 4277.

4 Union Ins. Co. *v.* Shaw, 2 Dill. 14. And see Rev. Stats. sec. 4472.

5 The New Jersey S. N. Co. *v.* Merchants' Bank, 6 How. 344. And see Rev. Stats. sec. 4471.

6 U. S. *v.* The Sun, 1 Am. Law Reg. N. S. 277; 4 West. Law J. 75. And see Rev. Stats. secs. 4417, 4418.

7 The New World *v.* King, 16 How. 469; The Highland Light, Chase Dec. 150.

8 U. S. *v.* The Seneca, 1 Am. Law Reg. N. S. 281; 4 West. Law Mon. 78; U. S. *v.* The Bright Star, 7 Int. Rev. Rec. 179; The Thomas Swan, 6 Ben. 42; The Daniel Ball, 10 Wall. 557.

9 The Thomas Swan, 6 Ben. 42; The Daniel Ball, 10 Wall. 557.

10 Elizabethport &c. Ferry Co. *v.* The U. S. 5 Blatchf. 198. See The Sylph, 4 Blatchf. 24. And see Rev. Stats. secs. 4426, 4427.

11 The James D. Parker, 23 Int. Rev. Rec. 66; U. S. v. The Laurel, Newb. 269. And see Rev. Stats. secs. 4472, 4476, 4276.

12 The George S. Wright, Deady, 591.

13 U. S. v. The Echo, 20 How. Pr. 517; 4 Blatchf. 446.

14 U. S. v. The Thomas Swan, 9 Law Rep. N. S. 201; The Morning Star, 4 Biss. 62.

15 U. S. v. The Sun, 1 Am. Law R. N. S. 277; 4 West. Law M. 75.

16 U. S. v. The C. B. Church, 1 Woods, 275.

§ 267. Obligation to receive passengers.—Passenger carriers are obliged to carry all persons who apply for a passage, if the accommodations are sufficient, unless there is a proper excuse for refusal.[1] If they refuse to take a passenger of good character and conduct, who pays his fare, and there is room for him, they are liable to action;[2] but they may rightfully exclude all persons of bad character or habits, or whose objects are to interfere with their interests, and they may rightfully inquire into the habits or motives of passengers who offer themselves,[3] and they may properly refuse passage to a person seeking to return to a town from which he has been forcibly expelled.[4] But after the ship had got to sea it was too late to take exceptions to the character of the passenger;[5] and after admission on board and payment of fare, the passenger cannot be expelled except for misbehavior.[6] The carrier having a right to the exclusive use of his vehicle, may, without unnecessary force, remove a passenger on his refusal to desist from the business of an express agent, when remonstrated with.[7]

1 Pierson v. Duane, 4 Wall. 615; Bennett v. Dutton, 10 N. H. 486; Jencks v. Coleman, 2 Sum. 221.

2 Saltonstall v. Stockton, Taney, 11; S. C. 13 Pet. 187.

3 Jencks v. Coleman, 2 Sum. 221.

4 Pearson v. Duane, 4 Wall. 605.

5 The D. R. Martin, 11 Blatchf. 237; Pearson v. Duane, 4 Wall. 605.

6 Pearson v. Duane, 4 Wall. 615; Prendergast v. Compton, 8 Car. & P. 462; Coppin v. Braithwaite, 8 Jur. 875.

7 The D. R. Martin, 11 Blatchf. 235; S. C. 18 Int. Rev. Rec. 55; Commonwealth v. Power, 7 Met. 596; S. C. 1 Rail Cas. 389. And see *ante*, sec. 234.

§ 268. Space allowed passengers.—An excess of passengers beyond the proportion of two to every five tons burden (since changed by statute)[1] subjects the master to a fine.[2] A violation of the act of Congress does not, at least before conviction of the master, give a lien for fines imposed upon him.[3] The carrier cannot impose an arbitrary regulation upon passengers, restricting their use of the steerage room; their rights include being furnished

with a berth.[4] The provisions of the Act as to the amount of space to be allowed for berths for passengers coming from foreign ports do not apply to steam vessels.[5] A master undertaking to bring a greater number of passengers than is permitted by statute is liable to a fine, although the agreement was made by a former master, if he knew, and had an opportunity to annul the agreement.[6]

1 U. S. v. Negres, 19 How. 94. And see Rev. Stats. sec. 4258.

2 U. S. v. Negres, 19 How. 94; U. S. v. The Louisa Barbara, Gilp. 332.

3 U. S. v. The Candace, 9 Int. Rev. Rec. 177.

4 The Griffiamme, 3 Sawy. 397; Koch v. Oregon S. S. Co. 2 Am. L. T. N. S. 281.

5 The Manhattan, 2 Ben. 86; S. C. 7 Int. Rev. Rec. 23. And see Rev. Stats. sec. 4255.

6 U. S. v. Morton, 1 Low. 179; U. S. v. The Anne, 2 Am. Law Reg. 421. And see U. S. v. The Louisa Barbara, Gilp. 332. And see Rev. Stats. sec. 4252. Regulations of passenger ships—see Rev. Stats. secs. 4256-4277.

§ 269. Rights of passengers.—Passengers do not only contract for room and transportation, but for good treatment and protection from any degree of violence, abuse, or ill treatment from other passengers, ships' servants, or other persons coming on board during the voyage.[1] Carriers are bound to precaution to protect passengers from violence from disorderly persons,[2] and female passengers from obscene conduct, lascivious behavior, and undue approach.[3] It is the duty of the master to exercise toward female and minor passengers the care of a parent.[4] He will be liable for suffering a gambler to decoy a minor, a passenger, into a game by which the minor lost money.[5] A soldier for whose transportation the Government had contracted, and who was discharged at sea during the voyage, does not take the character of a passenger as to immunity from the restraints of military authority.[6]

1 Pendleton v. Kinsley, 3 Cliff. 416.

2 Flint v. The Norwich Trans. Co. 6 Blatchf. 158.

3 Nieto v. Clark, 1 Cliff. 145; Flint v. The Norwich Trans. Co. 6 Blatchf. 158; Chamberlain v. Chandler, 3 Mason, 242.

4 Smith v. Wilson, 31 How. Pr. 272.

5 Smith v. Wilson, 31 How. Pr. 272.

6 White v. McDonough, 3 Sawy. 311.

§ 270. Liability on passenger contract.—There is no distinction between carriers of merchandise and carriers of passengers as to their responsibility to respond in damages for a breach of contract.[1] The owners are responsible for the breach of the passenger contract, and for resulting damage,[2] and for a return of the passage-money.[3]

The contract may or may not be completed, on arrival in port without landing, according to stipulations;[4] but a refusal to land a passenger at a specified point contracted for is a breach of the contract.[5] If passengers or seamen are carried to a port different from the one agreed upon they may maintain an action for damages.[6] Emigrant passenger ships are liable for expenses of landing and housing passengers at an intermediate port for the purpose of making repairs.[7] Where the carrier contracted to have the vessel in readiness, he is not exonerated from non-fulfillment by disability from stress of weather, and he is bound to refund the passage-money.[8] The passenger contract is personal, and not suable in admiralty by the master.[9] Where a carrier charters another vessel to transport passengers to their original destination, the substituted vessel is liable for failure to provide transportation.[10]

1 The Zenobia, Abb. Adm. 51; The Pacific, 1 Blatchf. 583; The Aberfoyle, Abb. Adm. 242; Griggs v. Austin, 3 Pick. 20; Pitman v. Hooper, 3 Sum. 50; Wolf v. Summers, 2 Camp. 631; Mulloy v. Backer, 5 East, 316; Howland v. The Lavinia, 1 Pet. Adm. 123; Mashiter v. Buller, 1 Camp. 34; Watson v. Duykinck, 3 Johns. 335; McGuire v. The Golden State, McAll. 105, distinguishing The Rebecca, 1 Ware, 188.

2 The Aberfoyle, 1 Blatchf. 360; The Zenobia, Abb. Adm. 48; Dennison v. The Watega, 1 Phila. 468.

3 Dennison v. The Wataga, 1 Phila. 468; Howland v. The Lavinia, 1 Pet. Adm. 123.

4 Passenger Cases, 7 How. 539; Howland v. The Lavinia, 1 Pet. Adm. 123.

5 The Canadian, 1 Brown Adm. 11.

6 Sunday v. Gordon, Blatchf. & H. 569.

7 Weston v. Train, 2 Curt. 49.

8 Cobb v. Howard, 3 Blatchf. 524, affirming S. C. 10 N. Y. Leg. Obs. 353.

9 Brackett v. The Hercules, Gilp. 190; Wolf v. Summers, 2 Camp. 631.

10 Dennison v. The Wataga, 1 Phila. 71.

§ 271. Liability for loss of baggage.—The liability for loss of baggage extends only to such as is delivered to the care of the carrier or his agents.[1] An agreement to carry ordinary baggage may be implied, but cannot be extended beyond such things as the traveler usually has with him as a part of his baggage,[2] and includes wearing apparel and bed and bedding.[3] Valuable laces were held reasonable apparel and baggage.[4] Jewelry worn as part of personal apparel[5] or left in the state-room in a carpet-bag,[6] a gold watch, a pair of gold spectacles, some money and some other small articles, and a valise containing th m, are baggage.[7] Money not exceeding a reasonable amount and a watch held part of baggage, and the trunk the proper place to keep them;[8] but a great amount of money cannot

§ 272. Damages for injuries and wrongs to passengers. — The contract for carrying passengers is not distinguished from the contract to carry merchandise, as to the liability of the carrier for damages.[1] The owners of the vessel are liable for the torts of the master when they involve a breach of the passenger contract, and are done while acting strictly within the scope of his employment.[2] It is immaterial whether such torts be by direct force, as trespasses, or consequential injuries,[3] as for disfigurement of the person.[4] So, physical pains and mental distress are grounds for damages.[5] Passengers may recover damages for improper conduct on the part of the master,[6] as from excess in his exercise of authority.[7] The principal is liable for the misconduct of his employee producing an injury, whether from malice or neglect,[8] although not for acts of mere personal, private malice;[9] for such acts there is a personal remedy against the master himself.[10] The liability of a vessel for injury to a passenger by the carelessness of the servants of the vessel is not released by the circumstance of the non-payment of fare, unless it is so understood.[11] The master may bind the owners on an agreement to give free passages,[12] but he must show a distinct understanding for the gratuitous passage and board of his wife and child.[13] Where employees were permitted to pass from place to place, free of charge, a person so carried is deemed legally on board, and the owners are liable for injuries by culpable negligence in the management.[14]

1 The Moses Taylor, 4 Wall. 411; The Aberfoyle, 1 Blatchf. 269; S. C. Abb. Adm. 242; The Pacific, 1 Blatchf. 569; Mulloy v. Backer, 5 East, 316.

2 McGuire v. The Golden Gate, McAll. 105; West v. The Uncle Sam, McAll. 510, explaining and distinguishing Chamberlain v. Chandler, 3 Mason, 242. And see Sherwood v. Hall, 3 Sum. 120; The Rebecca, 1 Ware, 188; The Phebe, 1 Ware, 263; Dean v. The Angus, Bee, 260; Waring v. Clarke, 5 How. 44; The New World v. King, 16 How. 469; The Revenge, 3 Wash. C. C. 262.

3 Chamberlain v. Chandler, 3 Mason, 242. And see Gillon v. Buddington, 1 Car. & F. 541; Howell v. Young, 5 Barn. & C. 259.

4 The Oriflamme, 3 Sawy. 397.

5 The D. S. Gregory, 2 Ben. 239; Curtis v. Rochester & S. R. R. Co. 18 N. Y. 534.

6 Chamberlain v. Chandler, 3 Mason, 242.

7 McGuire v. The Golden Gate, 1 McAll. 104.

8 Pendleton v. Kinsley, 3 Cliff. 416; Hibberd v. N. Y. & E. R. R. Co. 15 N. Y. 467. And see Railroad Co. v. Hanning, 15 Wall. 658; Higgings v. Watervleit T. Co. 46 N. Y. 23.

9 The Aberfoyle, Abb. Adm. 242; S. C. 1 Blatchf. 269; The Zenobia, Ibid. 80; Joy v. Allen, 2 Wood. & M. 318; The Rebecca, 1 Ware, 188.

10 The Aberfoyle, Abb. Adm. 237; Chamberlain v. Chandler, 3 Mason, 242.

11 Packet Co. v. Clough, 20 Wall. 528.

12 The New World v. King, 16 How. 469.

13 Marshall v. Crawford, 4 Sawy. 37.

14 The New World v. King, 16 How. 469; The Zenobia, Abb. Adm. 89.

§ 273. Negligence causing death or injury.—Negligence causing the death of a passenger may be punished on conviction as manslaughter.[1] The carrier is liable for the death of a passenger resulting from his negligence or that of his employees.[2] Where a hand on board a vessel was killed through the negligence of the engineer, the widow of the deceased could have redress against the owners *in personam*; the remedy *in rem* is confined to the action brought by the passenger.[3] But the carrier is not liable for an accident or misfortune which resulted from no negligence or default on his part, or that of his employees.[4] Where a passenger voluntarily encounters a seen danger, he is guilty of contributory negligence.[5] In a case of personal injury the presumption is that the accident was occasioned by the negligence of the carrier,[6] as by the escape of steam.[7] Under section 13 of the act of July 7th, 1838, if a person be injured by an explosion it is incumbent on the owners to prove there was no negligence; and the burden is increased in case the steamer was racing.[8] Where a child, a passenger on a steamship, was poisoned on the passage, and died, in consequence of negligence on the part of the officers of the ship, the cause of action arose on the contract, and survived to the administrator, and might be sued for *in rem*.[9] The remedy for negligent death or injury of a passenger is either *in rem* or *in personam*.[10] A master is liable to his servant as much as to any one else for his own negligence.[11] Section 4494 of the Revised Statutes does not preclude a mariner from proceeding against the vessel for damage suffered by himself in consequence of neglect or misconduct of the officers.[12]

1 U. S. v. Knowles, 4 Sawy. 520; Regina v. Pargeter, 3 Cox C. C. 191; Regina v. Karmes, 2 Car. & K. 368.

2 The City of Brussels, 6 Ben. 371; The Aberfoyle, Abb. Adm. 242. And that action lies for negligently causing death, see Steamboat Co. v. Chase, 16 Wall. 532; The Highland Light, Chase Dec. 151; R. R. Co. v. Barron, 5 Wall. 106; Penn. R. R. Co. v. McCloskey, 23 Pa. St. 526; Ford v. Monroe, 20 Wend. 210; The Platina, 11 Law Rep. N. S. 397; Barron v. Illinois Cent. R. R. Co. 1 Biss. 415. But see Cutting v. Seabury, 1 Sprague, 526.

3 Price v. The Highland Light, 2 Amer. L. T. 118. And see The Highland Light, Chase Dec. 156; Steamboat Co. v. Chase, 16 Wall. 532; Jones

contract the carrier is entitled only to what the carriage is worth.[8] A bill of lading containing no express promise or condition for payment of freight does not change the obligation under any special contract to pay it.[4] Where goods were shipped at an underdeck freight, but were actually carried on deck, the carrier was entitled only to deck freight.[5] Where the carrier carries the goods beyond the point stipulated, he is entitled to extra freight.[6] Where a vessel was wrecked, and the master and crew constructed another vessel out of the wreck and conveyed part of the cargo into port, they were entitled to freight as owners.[7] In the absence of a statement of weight in the bill of lading, the ship is entitled to the freight only on the weight delivered.[8] Although some figures are found on the margin of the bill of lading, apparently as the aggregate weight, yet the shipper is bound to pay only for the actual weight;[9] the weight stated in the inventory and entry is not conclusive.[10] The person who wants to ascertain the quantity must pay the expense of weighing;[11] but the vessel is bound to weigh the cargo when necessary, to enable her to compute the freight.[12] Where freight was to be paid at a certain rate for Indian corn or other grain, it includes only such grain as averaged in weight with the Indian corn.[13] After abandonment, the insurers are entitled to freight *pro rata*, and the owners of the vessel to freight subsequently earned.[14] As between different underwriters, the latter is entitled to freight *pro rata*, and the former to all subsequently earned.[15]

1 The Henry, Blatchf. & H. 465; The Excelsior, 2 Ben. 434.

2 Knox v. The Ninetta, Crabbe, 534.

3 Simmes v. Marine Ins. Co. of Alexandria, 2 Cranch C. C. 618.

4 Perkins v. Hill, 2 Wood. & M. 158; S. C. 1 Sprague, 123.

5 Vernard v. Hudson, 3 Sum. 405.

6 Swain v. U. S. Dev. 35.

7 The Holder Borden, 1 Sprague, 144.

8 Lot of Dry Hides, 6 Ben. 200; 18 Int. Rev. Rec. 166.

9 The Andover, 3 Blatchf. 3003; Lot of Dry Hides Ben. 200.

10 Lot of Dry Hides, 6 Ben. 200; 18 Int. Rev. Rec. 166.

11 Race v. Dry Ox Hides, 18 Int. Rev. Rec. 166; 6 Ben. 200; The Treasurer, 1 Sprague, 473; Coulthurst v. Sweet, Law Rep. 1 C. P. 643.

12 Lot of Dry Hides, 6 Ben. 201; Howland v. The Lavinia, 1 Pet. Adm. 123.

13 Warren v. Peabody, 8 Com. B. 800.

14 Columbian Ins. Co. v. Catlett, 12 Wheat. 386; Hammond v. Essex F. and M. Ins. Co. 4 Mason, 201; Splidt v. Bowles, 10 East, 279.

15 Hammond v. Essex F. and M. Ins. Co. 4 Mason, 196.

§ 276. Freight when earned.—The general rule is, that freight is only earned by a due performance of the entire voyage.[1] The only exception is where there is no default or inability of the carrier to perform the voyage, and he is ready to forward the goods, but for default on the part of the shipper, or his waiver of a further prosecution of the voyage;[2] and such waiver need not be by express agreement, but may be implied or inferred from acts.[3] If one entire voyage is stipulated for, the owner cannot recover unless the entire voyage and the whole service is performed.[4] The delivery of goods at the place of destination according to the terms of the charter party is necessary to entitle the owners to the stipulated compensation.[5] A delivery of the whole is a condition precedent to the right to freight.[6] If by stress of weather or other cause a ship puts into another port and unloads, or if wrecked and goods saved, they must at the expense of the carrier be transported to their destination before freight is payable.[7] The assent of a charterer to a deviation cannot vary his contract respecting freight.[8]

1 Caze v. Balt. Ins. Co. 7 Cr. 358; Sampayo v. Salter, 1 Mason, 43; The Saratoga, 2 Gall. 164; S. C. 6 Amer. Law J. 12; The Nathaniel Hooper, 3 Sum. 542; S. C. 2 Law Rep. 133; Hurtin v. Union Ins. Co. 1 Wash. C. C. 530; Simonds v. Union Ins. Co. Ibid. 443; Howland v. The Lavinia, 1 Pet. Adm. 123; Donahoe v. Kettell, 1 Cliff. 143; Weston v. Minot, 3 Wood. & M. 443; The Erie, 3 Ware, 232; Blanchard v. Buckman, 3 Me. 1; Vlierboom v. Chapman, 13 Mees. & W. 299.

2 The Nathaniel Hooper, 3 Sum. 542; S. C. 2 Law Rep. 133.

3 The Ann D. Richardson, Abb. Adm. 504; Hurtin v. Union Ins. Co. 1 Wash. C. C. 530.

4 Donahoe v. Kettell, 1 Cliff. 142; Weston v. Minot, 3 Wood. & M. 443; Watson v. Duykinck, 3 Johns. 335; Coffin v. Storer, 5 Mass. 252; Towle v. Kettell, 5 Cush. 18; Caze v. Balt. Ins. Co. 7 Cranch, 358; Sampayo v. Salter, 1 Mason, 43; The Saratoga, 2 Gall. 164; 6 Amer. Law J. 12; The Nathaniel Hooper, 3 Sum. 542; 2 Law Rep. 133; Hurtin v. Union Ins. Co. 1 Wash. C. C. 530; Simonds v. Union Ins. Co. Ibid. 443; Howland v. The Lavinia, 1 Pet. Adm. 123.

5 Hart v. Shaw, 1 Cliff. 362; Bright v. Cowper, 1 Brownl. 21; Cook v. Jennings, 7 Term Rep. 381; Towle v. Kettell, 5 Cush. 18; The Ann D. Richardson, Abb. Adm. 504; Coffin v. Storer, 5 Mass. 252; Bork v. Norton, 2 McLean, 426; Barker v. Cheviot, 2 Johns. 352; Howland v. The Lavinia, 1 Pet. Adm. 123; Blanchard v. Buckman, 3 Me. 1; The Harriman, 9 Wall. 174; Osgood v. Groning, 2 Camp. 466; The Nathaniel Hooper, 3 Sum. 554; Caze v. Baltimore Ins. Co. 7 Cranch, 358; Marcardier v. Chesapeake Ins. Co. 8 Cranch, 50; Vlierboom v. Chapman, 13 Mees. & W. 230.

6 Weston v. Minot, 3 Wood. & M. 442; Penoyer v. Hallett, 15 Johns. 332; Davidson v. Gwynne, 12 East, 381.

7 Howland v. The Lavinia, 1 Pet. Adm. 123; Bork v. Norton, 2 McLean, 422.

8 Mason v. The Blaireau, 2 Cranch, 240; Thatcher v. McCulloh, Olcott, 365.

§ 277. In case of capture.—Captors are not in general entitled to freight on the capture of neutral property on board of an enemy's ship, unless the goods are carried to the port of destination;[1] but they are entitled to freight if the property or its proceeds be ultimately destined to the place where the captors carry the ship.[2] The captors are substituted in the place of the original owners of the goods, and take it with its burdens.[3] Yet if the neutral carrier of enemy's property be guilty of fraudulent or unneutral conduct, he forfeits his title to freight; and a purchaser in good faith from a tortious possessor under an illegal capture is entitled to reimbursement for freight paid on the goods.[5] The capture of a neutral vessel does not operate a dissolution of the contract of affreightment.[6]

1 The Ann Green, 1 Gall. 274.

2 The Ann Green, 1 Gall. 274.

3 The Frances, 8 Cranch, 418; The Antonia Johanna, 1 Wheat. 159; The Society, 9 Cranch, 200; Bales of Cotton, Blatchf. Pr. 325; The Fanny, 9 Wheat. 658. See PRIZE.

4 The Commercen, 1 Wheat. 382; S. C. 2 Gall. 261; The Hannah M. Johnson, Blatchf. Pr. 160.

5 The Fanny, 9 Wheat. 658.

6 The Nathaniel Hooper, 3 Sum. 559, denying The Hoffnung, 6 C. Rob. 383; The Martha, 3 C. Rob. 106, note; The Racehorse, Id. 101.

§ 278. Full freight, when recoverable.—If the owner of the cargo is the cause of its non-transportation, full freight is due,[1] as where the goods were sold by the shipper,[2] or where the goods, by natural causes, and without the fault of the carrier, may have been deteriorated or diminished in transit,[3] as by leakage, decay, etc.[4] If the carriage of the goods be prevented by a blockade, still freight is collectible.[5] If a cargo is necessarily unloaded at an intermediate port and there sold, freight is earned;[6] so, where the consignee demanded and received delivery of goods short of their destination;[7] where the charterer wholly failed to fulfill the covenants of the contract, he becomes liable for the whole freight if the ship returns empty.[8] As where a party covenanted to load the whole or a part of a ship at a stipulated price and fails to do so,[9] but on agreement to furnish a certain number of barrels, at a price fixed per barrel, he fulfills the contract by delivering in good faith all he has.[10] If a vessel becomes disabled the master may refit in convenient time, or tranship the cargo; and if the freighter disagrees to this, the whole freight for the full voyage may be recovered.[11] Full freight is due where the carrier was ready to perform the voyage, and did perform it, as soon as the upper lakes were navigable.[12]

1 Hart v. Shaw, 1 Cliff. 263; Clark v. Crabtree, 2 Curt. 87; Clendaniel v. Tuckerman, 17 Barb. 184; Weston v. Minot, 3 Wood. & M. 444; Bork v. Norton, 2 McLean, 426; Giles v. The Cynthia, 1 Pet. Adm. 203; Kleine v. Catara, 2 Gall. 61; The Nathaniel Hooper, 3 Sum. 560; The Angerona, 1 Dods. 362. See CHARTER PARTY, § 218.

2 Weston v. Minot, 3 Wood. & M. 444; Hurtin v. Union Ins. Co. 1 Wash. C. C. 530; Harris v. Rand, 4 N. H. 259; Escopiniche v. Stewart, 2 Conn. 391.

3 Steelman v. Taylor, 9 Law Rep. N. S. 36; S. C. 3 Ware, 52.

4 Weston v. Minot, 3 Wood. & M. 444; Robinson v. Marine Ins. Co. 2 Johns. 325; The Cuba, 3 Ware, 260.

5 Weston v. Minot, 3 Wood. & M. 444; Bork v. Norton, 2 McLean, 422; Hart v. The Thomas Snow, 1 Cliff. 363; The Nathaniel Hooper, 3 Sum. 550; The Friends, 1 Edw. Adm. 246; The Hercules, 6 Amer. Law J. 21; Morgan v. Ins. Co. of N. A. 4 Dall. 455; Tonteng v. Hubbard, 3 Bos. & P. 295.

6 Murray v. Ætna Ins. Co. 4 Biss. 417.

7 Violett v. Stettinius, 5 Cranch C. C. 559; The Saratoga, 2 Gall. 164; 6 Amer. Law J. 12; Miston v. Lord, 1 Blatchf. 354; Case v. Balt. Ins. Co. 7 Cranch, 358; Sampayo v. Salter, 1 Mason, 43.

8 Kleine v. Catara, 2 Gall. 73; Edwin v. East India Co. 2 Vern. 210; Giles v. The Cynthia, 1 Pet. Adm. 207; Puller v. Halliday, 12 East, 494.

9 Kleine v. Catara, 2 Gall. 73.

10 Robinson v. Noble, 8 Pet. 181.

11 Bork v. Norton, 2 McLean, 426; Luke v. Lyde, 2 Burr. 881; Robinson v. Marine Ins. Co. 2 Johns. 325; Detouches v. Peck, 9 Ibid. 210.

12 Bork v. Norton, 2 McLean, 427; Palmer v. Lorillard, 16 Johns. 348.

§ 279. Apportionment of freight.—If the outward and homeward voyage be one entire voyage, on a failure to perform the homeward voyage the ship's owner cannot recover, but otherwise if they be separate voyages.[1] By the maritime law, freight is due as far as the charterer has had the beneficial use of the vessel;[2] it is due at every delivery port.[3] Freight contracted for in gross for a voyage outward and inward, cannot be apportioned and recovered upon a part of the cargo, or for a part of the voyage, unless an apportionment becomes feasible and just;[4] the court will be governed by equitable rather than strict common-law principles.[5] So, freight on a round voyage was apportioned, where an average loss occurred on the outward voyage.[6] Contracts, whether by charter party or bill of lading, admit of equitable apportionment in case of disaster, where the shipper voluntarily receives the goods.[7] Where, however, the port of distress and the port of shipment are the same, and no part of the voyage has been performed, shipper ought not to pay freight.[8] Ordinarily the exception of dangers of the seas does not entitle the vessel to claim freight in case of jettison, beyond the quantity delivered.[9] Where a part of the cargo which had suffered decay without the fault of the master

was thrown away, freight is earned and payable on that which remains.[10] The delivery of a complete cargo is not a condition precedent, but the master may recover freight for a short cargo at the stipulated rate, the freighter having his remedy in damages for short delivery.[11] The power of the consignee to bind the owners extends only to such acts as are within the objects of the consignment as to freight.[12]

1 Donahoe *v.* Kettell, 1 Cliff. 142; Mackrell *v.* Simond, 2 Chitt. 666.

2 The Erie, 3 Ware, 232; Towle *v.* Kettell, 5 Cush. 18; Donahoe *v.* Kettell, 1 Cliff. 142; Coffin *v.* Storer, 5 Mass. 282; S. C. 4 Amer. Dec. 54.

3 Relf *v.* The Maria, 1 Pet. Adm. 190; Luke *v.* Lyde, 2 Burr. 881.

4 Weston *v.* Minot, 3 Wood. & M. 436; S. C. 10 Law Rep. 305.

5 Weston *v.* Minot, 3 Wood. & M. 442; Dean *v.* Bates, 2 Wood. & M. 87.

6 The Mary, 1 Sprague, 17; Weston *v.* Minot, 3 Wood. & M. 436; S. C. 10 Law Rep. 305; Columbian Ins. Co. *v.* Ashby, 13 Pet. 330. See AVERAGE.

7 The Velona, 3 Ware, 140; Cutler *v.* Powell, 6 Term Rep. 320; The Erie, 3 Ware, 235; Weston *v.* Minot, 3 Wood. & M. 444; Post *v.* Robertson, 1 Johns. 24; The Mohawk, 8 Wall. 161; Osgood *v.* Groning, 2 Camp. 466; Williams *v.* Smith, 2 Caines, 13; Brown *v.* Lull, 2 Sum. 443; Coffin *v.* Storer, 5 Mass. 252; S. C. 4 Amer. Dec. 54.

8 Miston *v.* Lord, 1 Blatchf. 354.

9 The Cuba, 3 Ware, 260; Weston *v.* Minot, 3 Wood. & M. 444; Halwerson *v.* Cole, 1 Spears, 321.

10 The Collenburg, 1 Black, 170; The Cuba, 3 Ware, 260.

11 Ritchie *v.* Atkinson, 10 East, 295; Sheels *v.* Davis, 4 Camp. 118; Davidson *v.* Gwynne, 12 East, 381; Shields *v.* Davis, 6 Taunt. 65.

12 Nichols *v.* De Wolf, 1 R. I. 277.

§ 280. Freight pro rata.—Freight *pro rata* is earned where the goods were carried to the port of delivery and were refused by the consignee, in consequence of an order of the government.[1] Where, through any cause not within the control of the master, the voyage terminates at an intermediate port, where the cargo is voluntarily received by the owner thereof, freight *pro rata* is payable.[2] Where the voyage is broken up by a peril of the sea, neither shipper nor charterer is in general liable to the owner, beyond the time when the peril occurred; but the rule is subject to qualification.[3] If a part of the cargo be lost the owner may recover freight *pro rata*, if the rest reaches the shipper's hands,[4] on the principle of *quantum meruit*.[5] Acceptance at the place of disaster terminates the contract and all responsibility of the carrier, who is entitled to freight *pro rata*;[6] but the acceptance must be voluntary.[7] If received on compulsion, no freight is earned or is due,[8] as a compulsory receipt from the hands of the admiralty after

the master and not to the charterer, he is bound thereby;[7] he has no right to apply moneys due from him for freight to pay advances made by him to the charterer.[8] Under an ordinary bill of lading, the assignee of a bill of lading is bound to pay the freight as a condition of receiving the goods.[9] He is subject not only to the freight, but to the carrier's lien for the balance due under a charter party;[10] but, if it was assigned simply as security, he is not liable.[11] Freighters have no right to give bail for freight which they acknowledge to be due.[12] In the absence of any stipulations, freight is payable only when the merchandise is in readiness to be delivered to the person having the right to receive it,[13] and the master is not obliged to deliver any part of a consignment until the entire freight is paid or received, but the consignee is entitled to an opportunity to examine the goods.[14] Freight is a charge on the cargo, and the underwriters are not liable therefor, whether there has been an abandonment or not;[15] but it is not a charge upon the salvage whether the assured is or is not the owner of the vessel;[16] as between the insured and the underwriters, the underwriters are in no case liable for freight;[17] but when they accept goods at an intermediate port, they are liable for freight *pro rata*.[18] When payable in foreign money, freight is to be rated at its value in the port where payable, in the gold coin of the United States.[19]

1 Ruggles *v.* Bucknor, 1 Paine, 358; Perkins *v.* Hill, 2 Wood. & M. 166; Merrick *v.* Gordon, 20 N. Y. 93; Small *v.* Moates, 9 Bing. 574; Christy *v.* Rowe, 1 Taunt. 300; Ritchie *v.* Atkinson, 10 East, 295; Wyld *v.* Pickford, 8 Mees. & W. 458; Brotherton *v.* Wood, 3 Brod. & B. 54; 9 Price, 408.

2 Thatcher *v.* McCulloh, Olcott, 365; Bork *v.* Norton, 2 McLean, 423; Clarkson *v.* Edes, 4 Cow. 475; Perkins *v.* Hill, 2 Wood. & M. 166; Ruggles *v.* Bucknor, 1 Paine, 358; Mantor *v.* Holmes, 10 Met. 402; The Volunteer, 1 Sum. 551; Certain Logs of Mahogany, 2 Sum. 589; Drinkwater *v.* The Spartan, 1 Ware, 149.

3 Shaw *v.* Thompson, Olcott, 148; Palmer *v.* Gracie, 8 Wheat. 605; Ruggles *v.* Bucknor, 1 Paine, 358; The Volunteer, 1 Sum. 551.

4 Perkins *v.* Hill, 2 Wood. & M. 166; Dougal *v.* Kemble, 3 Bing. 383; Clarkson *v.* Edes, 4 Cow. 470; Faith *v.* East India Co. 4 Barn. & Ald. 630; Small *v.* Moates, 9 Bing. 574; Cook *v.* Taylor, 13 East, 399.

5 Philadelphia &c. R. R. Co. *v.* Barnard, 3 Ben. 39; Ridyard *v.* Phillips, 4 Blatchf. 443.

6 Perkins *v.* Hill, 2 Wood. & M. 165; Moore *v.* Wilson, 1 Term Rep. 659; Morson *v.* Kyner, 1 Maule & S. 303.

7 Shaw *v.* Thompson, Olcott, 144.

8 Shaw *v.* Thompson, Olcott, 144.

9 Trask *v.* Duvall, 4 Wash. C. C. 181, distinguishing Cook *v.* Taylor, 13 East, 399; Trask *v.* Duval, 4 Wash. C. C. 181; Act of Congress of March 2d, 1867, 14 S. L. 547.

10 Certain Logs of Mahogany, 2 Sum. 605; Small v. Moates, 9 Bing. 574.

11 Swett v. Black, 2 Sprague, 49; Blanchard v. Page, 8 Story, 281; Lesassier v The Southwestern, 2 Woods, 35.

12 Freight Money of the Monadnock, 5 Ben. 359; The Victor, 1 Lush. 72; The Lady Durham, 3 Hagg. Adm. 196; The Riby Grove, 2 W. Rob. 52.

13 Brittan v. Barnaby, 21 How. 527.

14 Brittan v. Barnaby, 21 How. 527; Certain Logs of Mahogany, 2 Sum. 589.

15 Caze v. Baltimore Ins. Co. 7 Cranch, 362; Baillie v. Modigliani, 6 Term Rep. 421; Thompson v. Rowcroft, 4 East, 34.

16 Columbian Ins. Co. v. Catlett, 12 Wheat. 396, criticising Baillie v. Modigliani, 6 Term Rep. 421. And see Hammond v. Essex F. and M. Ins. Co. 4 Mason, 201; Splidt v. Bowles, 10 East, 279.

17 Caze v. Baltimore Ins. Co. 7 Cranch, 358.

18 The Mohawk, 8 Wall. 153.

19 The Patrick Henry, 1 Ben. 293; Forbes v. Murray, 2 Ben. 497.

§ 282. Freight, when not earned.—A charge for freight where the master agrees to carry the goods of a mariner free, cannot be made.[1] Where the owner of a vessel sold her to be delivered in the future, stipulating to carry to the port of delivery any cargo belonging to the purchaser, but could not make a good title, he can claim no freight for conveyance of the cargo.[2] No freight can be charged on the natural increase of the property; freight is payable for the quantity shipped, not that delivered.[3] Where the voyage is broken up no more for the benefit of the cargo than for the owners, and shippers derived no benefit under the contract, they ought not to pay freight.[4] Freight is not due on the failure of the voyage,[5] as where it was defeated by an overwhelming calamity, necessitating a sale at an intermediate port,[6] or by some fortuitous event,[7] by accident or superior force,[8] as by a blockade of the port of destination,[9] or by an interdiction of commerce,[10] or an embargo rendering the fulfillment of the contract impossible,[11] or by capture, though the cargo be afterward restored.[12] Where a cargo is destroyed *in specie* by a peril of the sea, so that it loses its original character at the port of distress, or becomes so damaged that if reshipped a total destruction *in specie* would be inevitable, the shipper is not liable for the freight.[13] So, where a portion of the cargo is rendered worthless, and the residue not of sufficient value to justify the continuance of the voyage, and is therefore sold by the master, no freight can be claimed.[14] If the master, without sufficient cause, refuse to repair the vessel at a port of distress, and send on the goods, or procure another ship for that purpose, he can recover no freight.[15] Where the cargo is brought back to

the port of lading, the owner is not entitled to compensation.[16] Goods sold to pay salvage or money advanced to relieve a cargo from salvage, to the extent of the salvage, they are treated as if lost on the voyage, and no freight is due on them.[17] Where a vessel puts into a port of distress and the cargo is sold by the master and the voyage is broken up, no claim for freight can be maintained.[18]

1 Harrison *v.* The Eclipse, Crabbe, 223.

2 The Excelsior, 2 Ben. 434.

3 Gibson *v.* Sturge, 10 Exch. 622; 29 Eng. L. & E. 490.

4 Miston *v.* Lord, 1 Blatchf. 364; The Harriman, 9 Wall. 174; Lorillard *v.* Palmer, 15 Johns. 14.

5 Matter of Howard, 9 Wall. 175.

6 The Nathaniel Hooper, 3 Sum. 550; Weston *v.* Minot, 3 Wood. & M. 442; Caze *v.* Baltimore Ins. Co. 7 Cranch, 358; Hurtin *v.* Union Ins. Co. 1 Wash. C. C. 530; Miston *v.* Lord, 1 Blatchf. 352; Armroyd *v.* Union Ins. Co. 3 Binn. 437; Callender *v.* Ins. Co. of N. A. 5 Binn. 525; Gray *v.* Waln, 2 Serg. & R. 229; Mar. Ins. Co. *v.* U. Ins. Co. 9 Johns. 185; Liddard *v.* Lopez, 10 East, 526; Hunter *v.* Prinsep, 10 East, 378; Gray *v.* Waln, 2 Serg. & R. 228; The Nathaniel Hooper, 3 Sum. 550.

7 The Erie, 3 Ware, 2333; Towle *v.* Kettell, 5 Cush. 18.

8 The Saratoga, 2 Gall. 178; The Hiram, 3 C. Rob. 180.

9 Scott *v.* Libby, 2 Johns. 336; S. C. 3 Amer. Dec. 431; The Harriman, 9 Wall. 174; Lorillard *v.* Palmer, 15 Johns. 14.

10 Bork *v.* Norton, 2 McLean, 426; The Saratoga, 2 Gall. 164; Osgood *v.* Groning, 2 Camp. 466.

11 The Nathaniel Hooper, 3 Sum. 560; The Isabella Jacobina, 4 C. Rob. 77; The Wilhelmina Elenora, 3 C. Rob. 234; Bork *v.* Norton, 2 McLean, 422; The Saratoga, 2 Gall. 179.

12 Sampayo *v.* Salter, 1 Mason, 44.

13 Ridgford *v.* Phillips, 4 Blatchf. 443; The Nathaniel Hooper, 3 Sum. 550; Hunter *v.* Prinsep, 10 East, 378; 7 How. 595.

14 The Ann D. Richardson, Abb. Adm. 499; Miston *v.* Lord, 1 Blatchf. 354.

15 Welch *v.* Hicks, 6 Cow. 504; Bork *v.* Norton, 2 McLean, 430.

16 The Harriman, 9 Ware, 175; Smith *v.* Wilson, Abb. on Sp. 267; Atkinson *v.* Ritchie, 10 East, 530; Vlierboom *v.* Chapman, 13 Mees. & W. 230; Scott *v.* Libby, 2 Johns. 336; Smith *v.* Wilson, Abb. on Sh. 267; Liddard *v.* Lopez, 10 East, 526; Benner *v.* Equi. Ins. Co. 6 Allen, 222; Chase *v.* Alliance Ins. Co. 9 Allen, 311.

17 The Nathaniel Hooper, 3 Sum. 553; Luke *v.* Lyde, 2 Burr. 881.

18 The Ann D. Richardson, Abb. Adm. 499. Approved, 1 Blatchf. 358. And see Miston *v.* Lord, 1 Blatchf. 354.

§ 283. Recovery back of freight.—Freighters may recover back freight paid, if from any cause not attributable to them, the goods be not transported.[1] When the charterers took on themselves the risk of the voyage, they are not entitled to a return of the freight on failure of the voyage.[2] If a sum was to be paid absolutely in advance, as the price of the hiring, or the liquidated compensation

18 The Eliza's Cargo, 1 Low. 83; The Erie, 3 Ware, 225; Certain Logs of Mahogany, 2 Sum. 605; Faith v. The East India Co. 4 Barn. & Ald. 630.

19 Webb v. Anderson, Taney, 504.

20 Gracie v. Palmer, 8 Wheat. 605, reversing S. C. 4 Wash. C. C. 110.

21 The Marianna, 6 C. Rob. 24; The Abo, Spink's Prize, 46. See PRIZE.

§ 285. On vessel chartered.—As between the owner and charterer payment of freight is implied before the delivery of the goods,[1] the implication is in aid of the equitable contract to secure its fulfillment.[2] The lien exists for all the freight due and payable,[3] to the whole extent of the liability of the charterer.[4] Goods of third parties are liable for freight only to the extent of freight payable to the charterers by the shippers.[5] Where freight was payable to the charterers, and the owners' rights to freight had not accrued, the owners have no lien.[6] Where the charter party provided for compensation of the whole ship by the month, a person other than the charterer is liable for reasonable freight on a bill of lading in the usual form, adding, "as per charter party."[7] Where the stipulation was for a lien on the lading of the ship, the lien attaches on the goods of the charterer, and against his indorsee of the bill of lading.[8] Where possession and control remain with the master or consignee, who credits freight on consignment, the charterer, on debts owing him by the latter, will not acquit himself of liability to the master for freight.[9] It is usual in charter parties to stipulate that goods are bound for freight, or that freight shall be paid or secured on delivery. In all such cases the lien is considered perfect, notwithstanding a covenant for the payment of freight.[10] Defects in the ship which lead to taking on less cargo than usual, might sometimes defeat the recovery of freight.[11]

1 Webb v. Anderson, Taney, 516; Gracie v. Palmer, 8 Wheat. 605; Perkins v. Hill, 2 Wood. & M. 165; The Panama, Olcott, 382; The Rebecca, 1 Ware, 188.

2 Perkins v. Hill, 2 Wood. & M. 165; Shepard v. De Bernales, 13 East, 565; Barker v. Havens, 17 Johns. 234; Gracie v. Palmer, 8 Wheat. 605; Certain Logs of Mahogany, 2 Sum. 605.

3 Columbian Ins. Co. v. Catlett, 12 Wheat. 383; Palmer v. Gracie, 4 Wash. C. C. 117, distinguishing Paul v. Birch, 2 Atk. 621.

4 Gracie v. Palmer, 8 Wheat. 636; Webb v. Anderson, Taney, 515, distinguishing Faith v. East India Co. 4 Barn. & Ald. 630.

5 The Volunteer, 1 Sum. 573; Christie v. Lewis, 2 Brod. & B. 410; Small v. Moates, 9 Bing. 574; Faith v. East Ind. Co. 4 Barn. & Ald. 630.

6 Perkins v. Hill, 2 Wood. & M. 158.

7 Perkins v. Hill, 1 Sprague, 124; Drinkwater v. The Spartan, 1 Ware, 157; Donahoe v. Kettell, 1 Cliff. 139; Christie v. Lewis, 2 Ball & B. 410; Paul v. Birch, 2 Atk. 621. And see The Eliza's Cargo, 1 Low. 86.

8 Raymond v. Tyson, 17 How. 62; Small v. Moates, 9 Bing. 574.

9 Shaw v. Thompson, Olcott, 144.

10 The Volunteer, 1 Sum. 577; Pickman v. Woods, 6 Pick. 248.

11 Weston v. Minot, 3 Wood. & M. 447; Elliott v. Rossell, 10 Johns. 1; Silva v. Low, 1 Johns. 184; Putnam v. Wood, 3 Mass. 481; Lyon v. Mells, 5 East, 428.

§ 286. Effect of special stipulations.—Ship-owners may stand on the contract and seek their remedy on the form to which it originally belonged.[1] Stipulations to vary the law merchant in respect to obligations arising on a bill of lading must be in writing, signed by the parties.[2] The presumption of the law merchant must be negatived by an express stipulation in the contract.[3] The law does not absolutely depend on any covenant to pay on delivery; it exists if it does not appear that the delivery is to precede payment.[4] A clause binding the ship and cargo respectively is valid, and creates a pledge or lien on the cargo.[5] The lien of the owner is not limited by the amount of the penal sum stated in the charter party.[6] The master cannot deprive the owners of their lien on the cargo.[7] A stipulation to "have an absolute lien on the cargo for all freight, dead freight, and demurrage," held to include dead freight and demurrage.[8] The owner has a lien for freight under the charter party, where charterers are bound to deliver the vessel on her return.[9] Where the contract stipulates that the entire freight be paid at the port of shipment the lien attaches, although bills on time be given and accepted, which bills were afterwards dishonored.[10] Where the hire was to be paid semi-annually, the owners have not a lien on the outward cargo for the first six months' hire.[11] The cargo of a third person is not subject to the lien in favor of the owner or master on a contract for a fixed amount per month.[12] The owner of a vessel let to the Government has no lien on goods of the Government.[13]

1 The Bird of Paradise, 5 Wall. 561; The Kimball, 3 Wall. 37.

2 Brittan v. Barnaby, 21 How. 527.

3 The Bird of Paradise, 5 Wall. 562; How v. Kirchner, 11 Moore P. C. 21; Kirchner v. The Venus, 12 Ibid. 384.

4 The Volunteer, 1 Sum. 551; Gracie v. Palmer, 8 Wheat. 605; Saville v. Campion, 2 Barn. & Ald. 503; Christie v. Lewis, 2 Brod. & B. 410; Tate v. Meek, 8 Taunt. 280.

5 The Volunteer, 1 Sum. 551.

6 The Salem's Cargo, 1 Sprague, 389.

7 The Elisa, 1 Low. 61; The Freeman v. Buckingham, 18 How. 192; Gracie v. Palmer, 8 Wheat. 605; The Salem's Cargo, 1 Sprague, 386.

8 Bird of Paradise, 5 Wall. 559.

9 Certain Logs of Mahogany, 2 Sum. 589.

10 The Bird of Paradise, 5 Wall. 561; Gracie v. Palmer, 8 Wheat. 605; S. C. 4 Wash. C. C. 410; Campion v. Colvin, 3 Bing. N. C. 17; Small v. Moates, 6 Bing. 574; Gilkison v. Middleton, 2 Com. B. N. S. 134; Nelish v. Graham, 8 Ellis & B. 505.

11 Raymond v. Tyson, 17 How. 53.

12 Perkins v. Hill, 2 Wood. & M. 163; The Volunteer, 1 Sum. 551.

13 The Undaunted, 2 Sprague, 194.

§ 287. Waiver of lien.—The liability of the cargo cannot be extended beyond the stipulations in the charter party.[1] The lien for freight may be considered to have been waived if there are stipulations inconsistent with the exercise of the lien,[2] but this must be satisfactorily shown.[3] The language must be very strong, absolutely and entirely inconsistent, to exclude the lien of the owners.[4] A stipulation for payment after delivery of the cargo is inconsistent with the existence of the lien.[5] While the owner keeps possession by the master and crew, the lien can only be excluded by the most express and absolute terms, or by necessary implication from the contract.[6] An express stipulation of the time and manner of paying freight will not alone overturn the lien,[7] but it is lost if the goods are delivered and time allowed to pay the freight.[8] A stipulation to pay freight five or ten days after the return of the vessel is not a waiver of the lien.[9] The lien is not waived by taking drafts as conditional payment.[10] Where it distinctly appears that the owner trusted to the personal responsibility of the merchant, the lien is waived.[11] Where credit was given to the charterer, his subsequent insolvency cannot alter the terms, or shorten the credit,[12] as where the parties enter into a personal contract for a specific sum.[13] The lien may be modified or displaced by agreement, express or implied,[14] but is not waived by a statement in the bill of lading that freight has been settled.[15]

1 Webb v. Anderson, Taney, 504.

2 Raymond v. Tyson, 17 How. 53; Packard v. The Louisa, 2 Wood. & M. 54; Ruggles v. Buckner, 1 Paine, 363; Chandler v. Belden, 18 Johns. 157; Lucas v. Nockells, 4 Bing. 729; Cowell v. Simpson, 16 Ves. Jr. 275; Campion v. Colvin, 3 Bing. N. C. 17; Chase v. Westmore, 5 Maule & S. 180; Crawshay v. Homfray, 4 Barn. & Ald. 52; Fox v. Holt, 4 Ben. 287; The Eddy, 5 Wall. 481; The Bird of Paradise, 5 Wall. 556; Small v. Moates, 9 Bing. 574; Tate v. Week, 8 Taunt. 280; Kimball v. The Anna Kimball, 2 Cliff. 4; S. C. 3 Wall. 37; Sears v. Bags of Linseed, 1 Cliff. 63; Saville v. Campion, 2 Barn. & Ald. 503; Horncastle v. Farran, 3 Barn. & Ald. 497.

3 Ruggles *v.* Bucknor, 1 Paine, 358; The Bird of Paradise, 5 Wall. 558; Crawshay *v.* Homfray, 4 Barn. & Ald. 50.

4 Raymond *v.* Tyson, 17 How. 70; The Bird of Paradise, 5 Wall. 558; Campion *v.* Colvin, 3 Bing. N. C. 17; Stevenson *v.* Blakelock, 1 Maule & S. 535; Wilson *v.* Kymer, 1 Maule & S. 157; Neish *v.* Graham, 8 El. & B. 505; Crawshay *v.* Homfray, 4 Barn. & Ald. 50; Pinney *v.* Wells, 10 Conn. 104; Howard *v.* Macondray, 7 Gray, 516.

5 The Kimball, 3 Wall. 43; Foster *v* Colby, 3 Ex. 704.

6 Raymond *v.* Tyson, 17 How. 70; Certain Logs of Mahogany, 2 Sum. 589.

7 Raymond *v.* Tyson, 17 How. 70; Crawshay *v.* Homfray, 4 Barn. & Ald. 50; Chandler *v.* Belden, 18 Johns. 157.

8 Packard *v.* The Louisa, 2 Wood. & M. 58; Perkins *v.* Hill, 3 Ibid. 158; The Volunteer, 1 Sum. 551; The Tan Bark Case, 1 Brown Adm. 151; Sears *v.* Bags of Linseed, 1 Cliff. 73; Raymond *v.* Tyson, 17 How. 53; Anonymous, 11 Mod. 6; Sanders *v.* Vanzeller, 4 Q. B. 260; Skinner *v.* Upshaw, 2 Ld. Raym. 752.

9 The Bird of Paradise, 5 Wall. 558; The Kimball, 3 Wall. 44; Certain Logs of Mahogany, 7 Sum. 539; The Volunteer, 1 Sum. 551, denying Birley *v.* Gladstone, 3 Maule & S. 205.

10 The Emily Souder, 17 Wall. 670; The Kimball, 3 Wall. 37; S. C. 2 Cliff. 4; Raymond *v.* Tyson, 17 How. 62; Crawshay *v.* Homfray, 4 Barn. & Ald. 50; Fox *v.* Holt, 4 Ben. 237; The Eddy, 5 Wall. 481; Ruggles *v.* Bucknor, 1 Paine, 363; Chandler *v.* Belden, 18 Johns. 157; Lucas *v.* Nockells, 4 Bing. 729; Cowell *v.* Simpson, 16 Ves. Jr. 275; Chase *v.* Westmore, 5 Maule & S. 180; Crawshay *v.* Homfray, 4 Barn. & Ald. 52; Raymond *v.* The Ellen Stewart, 5 McLean, 271, distinguishing The Nestor, 1 Sum. 73.

11 The Bird of Paradise, 5 Wall. 560; Tamvaco *v.* Simpson, Law Rep. 1 C. P. 363.

12 *Ex parte* Lewis, 2 Gall. 485; Christie *v.* Lewis, 2 Brod. & B. 410; Phillips *v.* Rodie, 15 East, 547.

13 The Bird of Paradise, 5 Wall. 545. And see The Eddy, 5 Wall. 481.

14 Gracie *v.* Palmer, 8 Wheat. 605, reversing S. C. 4 Wash. C. C. 110.

§ 288. Lien, when not divested.—The lien is lost by an unconditional delivery of the cargo,[1] but otherwise if conditions are annexed;[2] a delivery to the consignee, with the understanding that the lien is to continue, does not divest the lien.[3] The delivery must be made with intent to part with the lien; mere manual delivery does not necessarily operate to discharge the lien.[4] The mere intent of the master to retain the lien and not communicated, where consignee bought and paid for the cargo delivered, without demanding the freight, is not sufficient to avoid the loss of the lien.[5] The lien is not divested by delivery of goods in warehouse,[6] nor is the lien discharged by transfer of the property.[7]

1 Kimball *v.* The Anna Kimball, 2 Cliff. 4; Sears *v.* Bags of Linseed, 1 Cliff. 68; S. C. 1 Black, 108; The Tan Bark Case, 1 Brown Adm. 151; The Bird of Paradise, 5 Wall. 555; The Eddy, 5 Wall. 481; Raymond *v.* Tyson, 17 How. 53.

2 Kimball *v.* The Anna Kimball, 2 Cliff. 4; Sears *v.* Bags of Linseed, 1 Cliff. 68; S. C. 1 Black, 108; The Tan Bark Case, 1 Brown Adm. 151.

3 Bags of Linseed, 1 Black, 108; The Kimball, 3 Wall. 44; Gaughran v. Tons of Coal, 18 How. Pr. 25.

4 Gaughran v. Tons of Coal, 18 How. Pr. 25; S. C. 15 Int. Rev. Rec. 34; 4 Blatchf. 368; The Santee, 2 Ben. 527.

5 The Tan Bark Case, 1 Brown Adm. 151; Bags of Linseed, 1 Black, 108; Bigelow v. Heaton, 4 Denio, 496.

6 Kimball v. The Anna Kimball, 2 Cliff. 15; The Volunteer, 1 Sum. 551; Certain Logs of Mahogany, 2 Sum. 589.

7 Webb v. Anderson, Taney, 518; Small v. Moates, 9 Bing. 574.

§ 289. Recoupment from freight. — An owner of goods damaged by fault of the carrier is entitled to a rebatement of the freight to the extent of the damage,[1] as on loss of part of the voyage,[2] or part of cargo.[3] Unreasonable delay in delivering is not a defense to a libel for the freight, without proof of damage through such delay.[4]

1 Kennedy v. Dodge, 1 Ben. 315; Bearse v. Ropes, 1 Sprague, 331; Thatcher v. McCulloh, Olcott, 365; Holyoke v. Depew, 2 Ben. 344; Snow v. Carruth, 1 Sprague, 324; Bradstreet v. Heran, Abb. Adm. 209; 9 Blatchf. 116; Zerega v. Poppe, 1 Abb. Adm. 397; Dedekam v. Vose, 3 Blatchf. 44.

2 Weston v. Minot, 3 Wood. & M. 443; Atkinson v. Ritchie, 10 East, 530.

3 Weston v. Minot, 3 Wood. & M. 443; Ritchie v. Atkinson, 10 East, 295.

4 Page v. Munro, 1 Holmes, 232.

CHAPTER XIII.

GENERAL AVERAGE.

§ 290. Doctrine of.
§ 291. Sacrifice must be voluntary.
§ 292. Effort must be successful.
§ 293. Damage to the vessel.
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§ 295. Damage or loss of cargo.
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§ 297. Expenses of saving ship and cargo.
§ 298. Contributory interests.
§ 299. What property contributes.
§ 300. Contributory values.
§ 301. Adjustment.
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§ 290. Doctrine of.—General average is a contract by the owners of the vessel, cargo, and freight towards loss sustained for the benefit of all. Partial or particular average means only a partial loss.[1] The doctrine of general average contribution is founded on the principles of equity and natural justice.[2] To constitute a general average three things must concur: first, a common danger imminent and apparently inevitable; second, a voluntary sacrifice to avoid it; and third, success in the attempt.[3] The property saved and the property sacrificed must be exposed to a common danger.[4] A common danger must occur, in which the ship, cargo, and crew participate; it must be imminent and apparently inevitable, except by voluntarily incurring the loss of a portion to save the remainder.[5] The greater and more imminent the peril, the more meritorious the claim for contribution, where the sacrifice was voluntary, and contributed to save associated interests from impending danger.[6] The master may select another and less peril, and recover on the general average from the cargo saved.[7] There may be a choice of perils, even when there is no possibility of perfect safety.[8] Where the vessel and cargo are in common peril, and the master, to avoid a greater peril, selects another and less peril, he may recover on general average from the cargo thereby saved.[9] As on a decision to enter a bay without a pilot, where the danger of remaining outside is greater than running in.[10] In an emergency, it is presumed, in the absence of contradictory proof, that the

master's decision was wisely made.[11] The owner of a vessel is not entitled to contribution for damages sustained or expenses incurred by perils of the seas, if she was unseaworthy when she left the port.[12] The question of contribution does not depend upon the amount of damage.[13]

1 Coster *v.* Phœnix Ins. Co. 2 Wash. C. C. 51. And see Potter *v.* Ocean Ins. Co. 3 Sum. 27; Peters *v.* Warren Ins. Co. 1 Story, 463.

2 McAndrews *v.* Thatcher, 3 Wall. 372; Nimick *v.* Holmes, 25 Pa. St. 366; Stater *v.* Hayward Rubber Co. 26 Conn. 128.

3 Barnard *v.* Adams, 10 How. 270; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331; Scudder *v.* Bradford, 14 Pick. 13; Delano *v.* Cargo of The Gallatin, 1 Woods, 644.

4 Delano *v.* Cargo of The Gallatin, 1 Woods, 642.

5 Barnard *v.* Adams, 10 How. 270; Delano *v.* Cargo of the Gallatin, 1 Woods, 644; Columbian Ins. Co. *v.* Ashby, 13 Peters, 231.

6 The Star of Hope, 9 Wall. 229; Barnard *v.* Adams, 10 How. 270.

7 O'Connor *v.* The Ocean Star, 1 Holmes, 248; The Watchful, 1 Brown Adm. 469.

8 The Star of Hope, 9 Wall. 233; Sims *v.* Gurney, 4 Binn. 513.

9 O'Connor *v.* The Ocean Star, 1 Holmes, 248.

10 The Star of Hope, 9 Wall. 234; Rea *v.* Cutler, 1 Sprague, 135.

11 The Star of Hope, 9 Wall. 234; Patten *v.* Darling, 1 Cliff. 254; Lawrence *v.* Minturn, 17 How. 100; Dupont *v.* Vance, 19 How. 162.

12 Wilson *v.* Cross, 33 Cal. 60.

13 Mutual Safe Ins. Co. *v.* The George, Olcott, 99; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331; 4 Ibid. 139.

§ 291. Sacrifice must be voluntary.— A common danger must exist, and the sacrifice of a part must be voluntary.[1] There must be an intent, a deliberate purpose to sacrifice the thing, at all events, or at the very least to put it in a situation in which the danger of eventual destruction would be incurred.[2] Whatever the master does in distress, for the preservation of the whole, as in cutting away masts or cables, or throwing goods overboard to lighten his vessel, is brought into general average;[3] but the cutting of a cable to avoid an apprehended collision is not a case of general average.[4] A consultation between the master, officers, and crew, though proper in some cases, need not precede a voluntary sacrifice.[5] Where the ship and cargo belong to the same person, the voluntary sacrifice of part of the vessel is to be borne by the ship and cargo alike, as if owned by separate persons.[6] If a voyage is abandoned by necessity, it is not a case of general average.[7] So the loss by an accidental collision of two vessels, without fault on either side, is not a case of general average.[8]

1 Delano *v.* Cargo of the Gallatin, 1 Woods, 642; Case *v.* Reilly, 3 Wash. C. C. 298; Sims *v.* Gurney, 4 Binn. 513; Gray *v.* Waln, 2 Serg. & R. 229; Barnard *v.* Adams, 10 How. 270.

2 Walker *v.* U. S. Ins. Co. 11 Serg. & R. 61; Lee *v.* Grinnell, 5 Duer, 411.

3 Jackson *v.* Charnock, 8 Term Rep. 509; Price *v.* Noble, 4 Taunt. 123.

4 The John Perkins, 11 Law Rep. N. S. 87.

5 Columbia Ins. Co. *v.* Ashby, 13 Pet. 331; Sims *v.* Gurney, 4 Binn. 513.

6 Potter *v.* Prov. Wash. Ins. Co. 4 Mason, 298; Griswold *v.* Union Mut. Ins. Co. 3 Blatchf. 231; Maggrath *v.* Church, 1 Caines, 196; Jumel *v.* Mar. Ins. Co. 7 Johns. 412; Williams *v.* London Assn. Co. 1 Maule & S. 321.

7 Williams *v.* Suffolk Ins. Co. 3 Sum. 510.

8 Peters *v.* Warren Ins. Co. 3 Sum. 393; Simonds *v.* White, 3 Barn. & C. 805; Dalglish *v.* Davidson, 5 Dowl. & R. 6; Loring *v.* Neptune Ins. Co. 20 Pick. 411; Thornton *v.* U. S. 12 Me. 150; Strong *v.* N. Y. Firemen's Ins. Co. 11 Johns. 323; Depau *v.* Ocean Ins. Co. 5 Cow. 63.

§ 292. Effort to save must be successful.—It is the safety of the property and not the voyage which constitutes the foundation of general average;[1] for where there is nothing saved there can be no contribution in any case;[2] nor if at the time of making the sacrifice, there was no possibility of saving the cargo.[3] General average can only arise where the sacrifice for the common benefit has accomplished the object.[4] It is the deliverance from an immediate impending peril by a common sacrifice, which constitutes the essence of the claim.[5] The attempt to avoid the peril must be to some practical extent successful;[6] some definite advantage must have sprung from it, and a final preservation must ensue;[7] the sacrifice of a part must contribute to the saving of the residue.[8] Where the loss did not contribute to the preservation of the goods saved it is not a case of general average,[9] as where after saving the goods by landing them, the vessel was subsequently captured.[10]

1 Columbia Insurance Co. *v.* Ashby, 13 Pet. 331; The Congress, 1 Biss. 46; Gray *v.* Waln, 2 Serg. & R. 228; Case *v.* Reilly, 3 Wash. C. C. 298; Sims *v.* Gurney, 4 Binn. 513.

2 The Star of Hope, 9 Wall. 229; Barnard *v.* Adams, 10 How. 270; Patten *v.* Darling, 1 Cliff. 254.

3 Crockett *v.* Dodge, 12 Me. 190.

4 Williams *v.* Suffolk Ins. Co. 3 Sum. 510; Scudder *v.* Bradford, 14 Pick. 13; McAndrews *v.* Thatcher, 3 Wall. 370; Barnard *v.* Adams, 10 How. 270.

5 Columbia Ins. Co. *v.* Ashby, 13 Pet. 331; Barnard *v.* Adams, 10 How. 270.

6 The Star of Hope, 9 Wall. 229; Patten v. Darling, 1 Cliff. 254; Barnard v. Adams, 10 How. 270; Sims v. Gurney, 4 Binn. 513; Case v. Reilly, 3 Wash. C. C. 296; Gray v. Waln, 2 Serg. & R. 229.

7 Lee v. Grinnell, 5 Duer, 411.

8 Delano v. Cargo of The Gallatin, 1 Woods, 642.

9 McAndrews v. Thatcher, 3 Wall. 374; Shepherd v. Wright, 1 Eq. Cas. Abr. 114.

10 Moran v. Jones, 7 Ellis & B. 532.

§ 293. Damage to the vessel.—Damage done to the knees and timbers of the vessel, caused by swelling of the cargo by water let in by scuttling, is a subject of general average;[1] so, the loss of a boat cut away from the stern davits,[2] and the loss of sails and spars on account of the stress of the weather, to avoid a lee shore or escape from an enemy or pirate;[3] so, cutting away masts and rigging,[4] so, damage caused to the bulwarks by cutting away masts and spars,[5] are subjects of general average. Where a vessel was dragging her anchors toward the shore, and the master cut away the masts to prevent her drifting, and thereupon she brought up, but after an hour she drifted again and was wrecked, the cargo saved is not liable in general average.[6] Where the mast, spars, rigging, and sails were carried away by stress of weather, and were hanging overboard and subsequently cut away to preserve the vessel and cargo, the contribution should be proportionate to the value of these articles only when hanging to the vessel's side.[7] If the bulwarks, stanchions, bulkheads, or decks of a ship are cut away for the purpose of saving the goods, it is regarded as a general average.[8] Where the master cut the cable of his best bower anchor, and with it fastened the vessel to the pier from which she was in danger of being drifted by the fury of the storm, it was a case of general average.[9] The right to contribution does not extend beyond those who voluntarily embark in a common adventure; so, no claim exists against a vessel for cutting a cable to avoid a collision.[10] Damage sustained in defense of a vessel from a public enemy is not a subject of claim to contribution,[11] nor damage done to ships, to extinguish a spontaneous combustion of part of the cargo.[12]

1 Lee v. Grinnell, 5 Duer, 310.

2 Lenox v. U. S. Ins. Co. 3 Johns. 178; Hall v. Ocean Ins. Co. 21 Pick. 472.

3 Covington v. Roberts, 2 New Rep. 378. *Contra*, Shiff v. Louisiana St. Ins. Co. 6 Mart. N. S. 629.

4 Potter v. Prov. Wash. Ins. Co. 4 Mason, 298.

5 Patten v. Darling, 1 Cliff. 396; Barnard v. Adams, 10 How. 270; Columbia Ins. Co. v. Ashby, 13 Pet. 331; Caze v. Reilly, 3 Wash. C. C. 298; Sims v. Gurney, 4 Binn. 513; Gray v. Wain, 2 Serg. & R. 228.

6 Scudder v. Bradford, 14 Pick. 13; Williams v. Suffolk Ins. Co. 2 Sum. 510; Whitteridge v. Norris, 6 Mass. 125; Nickerson v. Tyson, 8 Mass. 467; Maggrah v. Church, 1 Caines, 196; Sansom v. Ball, 4 Dall. 459; Sims v. Gurney, 4 Binn. 524.

7 Nickerson v. Tyson, 8 Mass. 467.

8 Nelson v. Belmont, 5 Duer, 310.

9 Birkley v. Presgrave, 1 East, 219; Marsham v. Dutrey, Sel. Cas. in Ev. 58.

10 The John Perkins, 21 Law Rep. 97.

11 Taylor v. Curtis, 6 Taunt. 608; S. C. 1 Holt. 194.

12 Crockett v. Dodge, 12 Me. 196.

§ 294. Voluntary stranding.—A voluntary stranding of a vessel to avoid capture, foundering, or wreck, is a case of general average.[1] Although the ship was totally lost, yet, if the stranding was voluntary, and designed for the common safety and resulted in saving the cargo, the case is a proper one for general average as to the property saved.[2] If the voluntary act of the master and crew is the direct occasion, the efficient motive and cause of the stranding, the loss becomes one of general average.[3] If the stranding was induced by the will of man, it is a voluntary stranding.[4] If the will of man did, in some degree, contribute to the stranding, it is enough to constitute a voluntary stranding within the meaning of the commercial law,[5] if the object be accomplished.[6] So, where the master voluntarily slips her cable to allow the vessel to be thrown on the beach to avoid a total loss,[7] and accidentally striking on a rock, will not change the intent,[8] or if he give her a direction to a part of the shore, where she could lie more safely, and by so doing the vessel is lost and the cargo saved, it is a voluntary sacrifice and an average loss.[9] If he believed there was an imminent peril of being driven on a rocky or dangerous coast, and that the peril was avoided by a voluntary stranding, it is sufficient.[10] The question of contribution turns on the fact of a voluntary shipwreck for the good of all concerned,[11] or to promote the general safety;[12] but if rendered necessary by any unjustifiable deviation or negligent act of the master, the loss must be attributed to that fault rather than the sea peril.[13] Where the captain, having no possible means of saving the vessel and cargo and preserving the lives of the crew, slipped her cables, and ran her on shore for the safety of the crew and preservation of the vessel and cargo, it is a case of voluntary stranding;[14] and where she is afterwards recovered and

performs the voyage, the damages resulting from this sacrifice are to be borne as a general average.[15] Where the bows of a vessel were cut by ice, and she and the cargo were in danger of going down in deep water, and the master stranded her in shallow water, the case was one of voluntary stranding, authorizing a contribution in general average, although a portion of the cargo was wet;[16] but where a part of the cargo was injured by water coming in through the holes made by the ice, and the vessel injured thereby, the injury was a damage from a peril of the sea, and not to be allowed in general average.[17] Where, during a severe storm, the mizzen sail was so torn that the vessel could not be kept up to the wind, but fell off into the trough of the sea, and was in danger of being thrown upon her beam ends, and she was accordingly run ashore, it was a case of voluntary stranding, though the vessel proved a total loss, her cargo being almost all saved.[18]

1 The Star of Hope, 9 Wall. 232; Fowler v. Rathbones, 12 Wall. 117; Nelson v. Belmont, 21 N. Y. 36; McAndrews v. Thatcher, 3 Wall. 347; Barnard v. Adams, 10 How. 270; Lewis v. Williams, 1 Hall, 430.

2 Columbian Ins. Co. v. Ashby, 13 Pet. 343; Caze v. Reilly, 3 Wash. C. C. 298; Sims v. Gurney, 4 Binn. 513; Gray v. Waln, 2 Serg. & R. 228; Barnard v. Adams, 10 How. 270; Fowler v. Rathbones, 12 Wall. 117; S. C. 6 Blatchf. 294; The Star of Hope, 9 Wall. 203; Mutual Safe. Ins. Co. v. The George, Olcott, 99, disapproving Bradhurst v. Columbian Ins. Co. 9 Johns. 9. And see Merithew v. Sampson, 4 Allen, 192; Patten v. Darling, 1 Cliff. 254; Bales of Cotton, 8 Blatchf. 221; Whitteridge v. Norris, 6 Mass. 125; Rea v. Cutler, 1 Sprague, 135; Sturgess v. Carey, 2 Curt. 68.

3 Mutual Safe. Ins. Co. v. The George, Olcott, 100; Gray v. Waln, 2 Serg. & R. 228; Caze v. Reilly, 3 Wash. C. C. 298; Whitteridge v. Norris, 6 Mass. 125; Sims v. Gurney, 4 Binn. 513.

4 The Star of Hope, 9 Wall. 203.

5 The Star of Hope, 9 Wall. 203.

6 Caze v. Reilly, 3 Wash. C. C. 298; Patten v. Darling, 1 Cliff. 254; Rathbone v. Fowler, 6 Blatchf. 294; S. C. 12 Wall. 162; Bales of Cotton, 8 Blatchf. 221.

7 Sturgess v. Cary, 2 Curt. 59.

8 Rea v. Cutler, 1 Sprague, 137; 7 How. 729; Sims v. Gurney, 4 Binn. 513; Walker v. U. S. Ins. Co. 11 Serg. & R. 61.

9 Barnard v. Adams, 10 How. 270; Caze v. Reilly, 3 Wash. C. C. 298; Sims v. Gurney, 4 Binn. 513; Gray v. Waln, 2 Serg. & R. 229; Fitzpatrick v. Bales of Cotton, 3 Ben. 47; Columbian Ins. Co. v. Ashley, 13 Pet. 331; Rea v. Culler, 1 Sprague, 135.

10 Barnard v. Adams, 10 How. 302; Caze v. Reilly, 3 Wash. C. C. 298; Sims v. Gurney, 4 Binn. 513; Gray v. Waln, 2 Serg. & R. 229; Columbian Ins. Co. v. Ashby, 13 Pet. 331; Bales of Cotton, 8 Blatchf. 228; S. C. 3 Ben. 42; The Star of Hope, 9 Wall. 203.

11 Caze v. Reilly, 3 Wash. C. C. 309; Clarkson v. Phœnix Ins. Co. 9 Johns. 1.

12 O'Connor v. The Ocean Star, 1 Holmes, 248.

13 The Portsmouth, 9 Wall. 682; O'Connor v. The Ocean Star, 1 Holmes, 243.

14 Columbian Ins. Co. v. Ashby, 13 Pet. 331; Bales of Cotton, 8 Blatchf. 226.

15 Columbian Ins. Co. v. Ashby, 13 Pet. 342, denying Bradhurst v. Columbian Ins. Co. 9 Johns. 9.

16 Rathbone v. Fowler, 6 Blatchf. 294; S. C. 12 Wall. 162.

17 Rathbone v. Fowler, 6 Blatchf. 294; S. C. 12 Wall. 162.

18 Bales of Cotton, 8 Blatchf. 221.

§ 295. Damage, or loss of cargo.—The loss or damage to the cargo by pouring water down to extinguish a fire,[1] or by scuttling the vessel to extinguish a fire, is the subject of general average.[2] The damage done to goods by water, which unavoidably goes down a ship's hatches opened, or other opening made for the purpose of a jettison, is contributed for in general average,[3] or by water entering through the aperture on the mast being cut away.[4] But, in case of a stranding, a part of the cargo being injured, it is not a case of general average, but a damage from a peril of the seas.[5] If it be necessary to remove the cargo, and after removal it is destroyed by fire, it is not a voluntary sacrifice, nor a case of general average.[6] So, where the removal of the cargo increased an incipient decay and hastened a partial destruction, it is not a case of general average.[7] Where goods were inherently prone to decay or to deteriorate during a delay in a port of necessity, the owner cannot claim for a general average.[8] The taking of the property of the shipper on a forced loan is a case of general average;[9] so, sacrifices by sale of cargo to raise means.[10] A sale of part of the cargo is equivalent to a hypothecation of the whole, and a fit subject of general average.[11] Where cargo was sold at a port of refuge, and the proceeds applied for the common benefit, the vessel, freight, and cargo are bound to contribute in like manner as if the cargo had been jettisoned;[12] so, where sold for necessaries to enable the ship to prosecute her voyage,[13] in case ship and owners could not satisfy the claim;[14] so, where sold for the purpose of making repairs,[15] or to relieve the vessel from seizure for non-payment of sound dues,[16] but the owner cannot claim general average where the master, in a port of necessity, sold the cargo to pay money raised on bottomry.[17]

1 Nelson v. Belmont, 5 Duer, 323; Lee v. Grinnell, 5 Duer, 400; Nimick v. Holmes, 25 Pa. St. 366.

2 Nelson v. Belmont, 5 Duer, 310; Lee v. Grinnell, 5 Duer, 400.

3 Columbia Ins. Co. v. Ashby, 13 Pet. 343.

4 Maggrath *v.* Church, 1 Caines, 196; Saltus *v.* Ocean Ins. Co. 14 Johns. 138.

5 Rathbone *v.* Fowler, 6 Blatchf. 294; S. C. 12 Wall. 162.

6 Shelton *v.* The Mary, 5 Law Rep. 75; S. C. 6 Ibid. 73; 1 Sprague, 17.

7 Bond *v.* The Superb, 1 Wall. Jr. 355.

8 Bond *v.* The Superb, 1 Wall. Jr. 355, distinguishing Maggrath *v.* Church, 1 Caines, 196.

9 The Mary, 1 Sprague, 54; Sims *v.* Willing, 8 Serg. & R. 103; The Packet, 3 Mason.

10 The Star of Hope, 9 Wall. 203; Orrok *v.* Comm. Ins. Co. 21 Pick. 456.

11 The Gratitudine, 3 C. Rob. 240; Richardson *v.* Nourse, 3 Barn. & Ald. 237; The Constancia, 4 No. of Cas. 677; The Leonidas, Olcott, 16; The Hoffnung, 6 C. Rob. 383; Mut. Safe. Ins. Co. *v.* The George, Olcott, 96.

12 The Packet, 3 Mason, 260; Giles *v.* Eagle Ins. Co. 2 Met. 144.

13 The Packet, 3 Mason, 260; Giles *v.* Eagle Ins. Co. 2 Met. 144; The Leonidas, Olcott, 15.

14 The Leonidas, Olcott, 16; American Ins. Co. *v.* Coster, 3 Paige, 323; The Gratitudine, 3 C. Rob. 240; The Hoffnung, 6 C. Rob. 383; The Packet, 3 Mason, 260; Mut. Safe Ins. Co. *v.* The George, Olcott, 96; The Mary, 1 Sprague, 54.

15 Shelton *v.* The Mary, 6 Law Rep. 75; Dupont *v.* Vance, 19 How. 173; Pope *v.* Nickerson, 3 Story, 465.

16 Dobson *v.* Wilson, 3 Camp. 487.

17 Pope *v.* Nickerson, 3 Story, 465.

§ 296. Loss by jettison. — Controversies more frequently arise in cases where the sacrifice was made by jettison of portions of the cargo, than any other disaster.[1] A jettison is permitted only in case of extreme necessity.[2] Where the unseaworthiness of the vessel, at the time of sailing on the voyage, caused or contributed to produce the necessity for the jettison, the vessel is liable for the whole value of the goods thrown overboard.[3] Where a part of the cargo is thrown overboard, a contribution might be required from the owners of the vessel, and of the cargo saved;[4] as when thrown overboard to escape capture.[5] The loss must be borne in due proportion by all benefited by the jettison.[6] It should be contributed, for, though it happen to articles described as perishable,[7] jettison may be regarded as voluntary, notwithstanding that but for such sacrifice a total loss would have been inevitable.[8] Where by the bill of lading it is agreed that a portion of the cargo shall be carried on deck, the vessel must contribute for the loss of the deck load by jettison.[9] Where the loading on deck was with the consent of the merchant, the carrier will not be responsible in case of jettison.[10] If goods laden on deck with consent of the shipper, under a bill of lading, excepting "dangers of navigation," are necessarily jettisoned, this does not make

a case of general average.[11] Goods stowed on deck and thrown overboard for the common safety, are not the subject of a general average.[12] An insured may recover the contributory share due him on a loss by jettison in the first instance from the insurer, before resorting to those entitled to contribute.[13]

1 The Star of Hope, 9 Wall. 231; Birkley *v.* Presgrave, 1 East, 220; Griswold *v.* Union Mut. Ins. Co. 3 Blatchf. 234; Lapsley *v.* Pleasant, 4 Binn. 502.

2 The Gratitudine, 3 C. Rob. 240; Lawrence *v.* Minturn, 17 How. 100.

3 Dupont *v.* Vance, 19 How. 162; Lawrence *v.* Minturn, 17 How. 100.

4 Dike *v.* The St. Joseph, 6 McLean, 573.

5 Caze *v.* Reilly, 3 Wash. C. C. 298.

6 Barnard *v.* Adams, 10 How. 303; Lee *v.* Grinnell, 5 Duer, 431; Simonds *v.* White, 2 Barn. & C. 805.

7 Maggrath *v.* Church, 1 Caines, 196; S. C. 2 Amer. Dec. 173; Griswold *v.* Union Mut. Ins. Co. 3 Blatchf. 234.

8 Barnard *v.* Adams, 10 How. 270; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331; Sims *v.* Gurney, 4 Binn. 513.

9 The Watchful, 1 Brown Adm. 469, distinguishing The Milwaukee Belle, 2 Biss. 197; Gould *v.* Oliver, 4 Bing. N. C. 142; Dupont *v.* Vance, 19 How. 162.

10 Lawrence *v.* Minturn, 17 How. 114; Hampton *v.* The Thaddeus, 4 Mart. 582; Smith *v.* Wright, 1 Caines. 43; Dodge *v.* Bartol, 5 Me. 286; Gould *v.* Oliver, 4 Bing. N. C. 142; Sayward *v.* Stevens, 3 Gray, 97; Lenox *v.* United Ins. Co. 3 Johns. Cas. 178; Harris *v.* Moody, 4 Bosw. 210; Millward *v.* Hibbert, 3 Q. B. 120; The Delaware, 14 Wall. 599; Dupont *v.* Vance, 19 How. 174; Case of Mouse, 12 Coke, 63.

11 The Paragon, 1 Ware, 322; Triplet *v.* Van Name, 2 Cranch C. C. 332; Ray *v.* The Milwaukee Belle, 2 Biss. 197; S. C. 3 Amer. L. T. 65.

12 Smith *v.* Wright, 1 Caines, 43; S. C. 2 Amer. Dec. 162; Harris *v.* Moody, 30 N. Y. 269.

13 Maggrath *v.* Church, 1 Caines, 196; S. C. 2 Amer. Dec. 173. *Contra*, Lapsley *v.* Pleasants, 4 Binn. 602.

§ 297. Expenses of saving ship and cargo.—The expenses of saving the ship and cargo are proper subjects of general average.[1] Disbursements made for the common benefit must be reimbursed in general average, whether the ship and cargo be eventually saved or not.[2] Where a vessel is accidentally stranded, the expense incurred in enabling her to complete her voyage is a general average,[3] as the expense of refloating the vessel,[4] the hire of extra hands to pump the water out of the ship,[5] expenses of lighterage.[6] Where a ship was stranded by a peril of the sea, and the cargo discharged and forwarded in another vessel, and subsequently new measures were adopted and additional expense incurred in getting the vessel into port, the expenses incurred from the misadventure were a general average, but the subsequent expenses

were chargeable to the ship.[7] The expenses of the new enterprise would constitute a general average, provided the cargo remains under the control of the master;[8] whatever is done for the common interest must be done at the common expense. Where a vessel meets with disaster and bears up for a port of necessity, wages and provisions of master, officers, and crew are chargeable as general average,[9] and every expense necessarily incurred during her detention, for the benefit of all concerned.[10] So, in case of detention by capture,[11] but not during a detention by an embargo.[12] Nor are the expenses of the cure of sick seamen deemed a general average.[13] The wages of a master, after capture and until condemnation, are a charge on the owners and ultimately to be borne by all the parties in interest.[14] If the crew be detained during a delay to claim a captured ship and cargo, for the purpose of prosecuting the voyage, on a decree of release, their wages and provisions during such detention are to be contributed for.[15] If a ship be obliged to put into an intermediate port for repairs the charges of entering the harbor,[16] towing into port,[17] surveyor's bill and port charges, unloading and docking for repairs,[18] extra expense in keeping her afloat,[19] hire of anchors, cables, boats, and other necessary apparatus, as well as expenses of warehousing and reloading after repairs are completed, are subjects of general average.[20] But where the vessel, from ordinary decay, requires repairs at an intermediate port, the expenses are not the subject of general average.[21] Salvage charges may be a subject of general average,[22] the expense of the salvage allowed for recovering captured property,[23] and the costs of a salvage suit instituted by all the salvors conjointed against all the property saved, are subjects of general average.[24] Losses which arise out of extraordinary expenses incurred for the joint benefit of the ship and cargo,[25] as expenses arising by capture,[26] as for delay in making claim for the vessel and cargo,[27] and the necessary costs incurred,[28] the *bona fide* expenses to obtain a release of the vessel,[29] the ransom paid in good faith for the benefit of all concerned, are subjects of general average.[30] So, commissions for collecting general average are charges to be borne in common.[31] This rule is not founded on local customs, but upon the general law merchant.[32] But the expense of freeing the master from arrest, for his individual debt, is not a general average,[33] nor are the expenses of delay at the termination of the adventure.[34]

22 The Congress, 2 Biss. 42; Montgomery v. Tyson, 1 Low. 133; Joy v. Allen, 2 Wood. & M. 303.

23 Williams v. Suffolk Ins. Co. 3 Sum. 270, 510; Meyliger v. N. Y. Firem. Ins. Co. 11 Johns. 35.

24 Peters v. Warren Ins. Co. 1 Story, 463.

25 McAndrews v. Thatcher, 3 Wall. 347; The Star of Hope, 9 Wall. 237; Fowler v. Rathbones, 12 Wall. 118; Meran v. Jones, 7 El. & B. 523; Walthew v. Mavrojani, Law Rep. 5 Ex. 119.

26 Kern v. Groning, 1 Brev. 506.

27 Speyer v. N. Y. Ins. Co. 3 Johns. 89; Jumel v. Marine Ins. Co. 7 Johns. 412; Kingston v. Girard, 4 Dall. 274; Dorr v. Union Ins. Co. 8 Mass. 494.

28 Spafford v. Dodge, 14 Mass. 66.

29 Leavenworth v. Delafield, 1 Caines, 573; 2 Amer. Dec. 201; Vandenheuvel v. United Ins. Co. 1 Johns. 406.

30 Douglas v. Moody, 9 Mass. 548; Sansom v. Ball, 4 Dall. 459; Maisonnaire v. Keating, 2 Gall. 328. And see Girard v. Ware, Peters C. C. 142; Wells v. Gray, 10 Mass. 42; Clarkson v. Phœnix Ins. Co. 9 Johns. 1; Parsons v. Scott, 2 Taunt. 363; Webb v. Brooke, 3 Taunt. 6.

31 Barnard v. Adams, 10 How. 270; Sturgis v. Cary, 2 Curt. 382.

32 Sturgess v. Carey, 2 Curt. 382.

33 Dobson v. Wilson, 3 Camp. 480.

34 Dunham v. Commercial Ins. Co. 11 Johns. 315.

§ 298. Contributory interest.—When two or more parties engage in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger, or incurs extraordinary expense to promote the safety of the associated interests, common justice requires that it be assessed on all the interests in proportion to the share of each in the adventure.[1] In case of loss or expense by a necessary deviation of a chartered vessel, both vessel and cargo must contribute;[2] all parties concerned are to make contribution.[3] A consignee who is absolute owner is liable to contribute.[4] Freight is to be brought into the account in general average.[5] Where the freight was a gross sum for the round voyage, and not divisible, the whole freight must contribute;[6] otherwise only the freight earned pays[7] *pro rata* freight.[8] Pending freight contributes and receives if the vessel be totally lost.[9] Freight lost by a jettison of the goods, or by any sacrifice, is to be contributed for.[10] So, if the vessel be voluntarily stranded to save the cargo, and being lost cannot carry it forward and earn her freight, this is part of the sacrifice.[11] Mariners do not contribute in general average, except in cases of ransoms or recapture,[12] but shares in an adventure are subject to general average.[13] So, whale blubber or pieces of whale are subjects of general average.[14] Where a vessel is libeled and sold on a bottomry bond, the fund in court is

not subject as against the bond-holder to a general average loss subsequent to the date of the bond.[15] A stipulation by consignees to pay average is a personal obligation and not binding on the owners, and does not discharge the owners from contribution.[16]

1 Fowler *v.* Rathbone, 12 Wall. 114; The Star of Hope, 9 Wall. 203.

2 Campbell *v.* Alknomac, Bee, 124.

3 Simonds *v.* White, 2 Barn. & C. 805.

4 Dupont *v.* Vance, 19 How. 179; Scaife *v.* Tobin, 3 Barn. & Adol. 523.

5 Mutual Safe Ins. Co. *v.* The George, Olcott, 167; Case *v.* Reilly, 3 Wash. C. C. 298; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331; Gray *v.* Waln, 2 Serg. & R. 228.

6 The Mary, 1 Sprague, 20; Williams *v.* London Assurance Co. 1 Maule & S. 318; The Dorothy Foster, 6 C. Rob. 88; Shelton *v.* The Mary, 5 Law Rep. 75. And see Spofford *v.* Dodge, 14 Mass. 66.

7 Lee *v.* Grinnell, 5 Duer, 431.

8 The Nathaniel Hooper, 3 Sum. 542; Maggrath *v.* Church, 1 Caines, 196; The Dorothy Foster, 6 C. Rob. 88.

9 Columbian Ins. Co. *v.* Ashby, 13 Pet. 331; The Mary, 1 Sprague, 21; The Progress, Edw. Adm. 210; Spafford *v.* Dodge, 14 Mass. 66; Williams *v.* London Assu. Co. 1 Maule & S. 318; The Nathaniel Hooper, 3 Sum. 566; Fitzpatrick *v.* Bales of Cotton, 3 Ben. 49.

10 Nelson *v.* Belmont, 5 Duer, 322; The Nathaniel Hooper, 3 Sum. 542.

11 Columbian Ins. Co. *v.* Ashby, 13 Pet. 331.

12 The Saratoga, 2 Gall. 164; Utpadel *v.* Fears, 1 Sprague, 559.

13 Utpadel *v.* Fears, 1 Sprague, 559.

14 Rogers *v.* Mechs. Ins. Co. 1 Story, 603.

15 Oologardt *v.* The Anna, 9 Amer. Law Reg. N. S. 475; 12 Int. Rev. Rec. 130.

16 Eckford *v.* Wood, 5 Ala. 136.

§ 299. What property contributes.—All property exposed to the risk of stranding, must contribute;[1] so in case of an actual sale of a part.[2] All property on board the vessel at the time of the jettison, and saved, unless attached to the person of the passengers, is brought into contribution,[3] including government property,[4] and government stores, but only on their cost price.[5] All merchandise on board, including property of great value, unless attached to the person of the passengers,[6] bank-bills being regarded as property,[7] money, bills of credit, choses in action, etc., are excepted only when carried like clothes or luggage under the personal care of the passenger or seaman.[8] It is only property saved which can be made to contribute for the lost.[9] Goods shipped on deck contribute if saved, but if lost by jettison they are not entitled to the benefit of contribution;[10] but if carried according to the custom of trade, and stowed in the usual way,

they are entitled to contribution if lost.[11] The liability of the cargo to contribute does not continue after it has been completely separated from the vessel, so as to leave no community of interest remaining.[12] Thus, goods jettisoned do not contribute for any damage afterward done to the residue of the cargo.[13] So, also, the owner of the cargo cannot be held to contribute toward the expense of repairs of a vessel, when the cargo is in safety, and receives no benefit therefrom.[14] If goods stowed on deck are sacrificed, goods under deck do not contribute.[15] Provisions for the crew and passengers are not liable to contribute in any case.[16]

1 Mutual Safe. Ins. Co. *v.* The George, Olcott, 157.

2 The Packet, 3 Mason, 260; The Gratitudine, 3 C. Rob. 240; The Hoffnung, 6 C. Rob. 333.

3 Harris *v.* Moody, 3 N. Y. 266; McAndrews *v.* Thatcher, 3 Wall. 374; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331.

4 U. S. *v.* Ames, 1 Wood. & M. 81; U. S. *v.* Wilder, 3 Sum. 308; U. S. *v.* Barney, 3 Amer. Law J. 128; The Siren, 7 Wall. 161; The Davis, 10 Wall. 18; S. C. 6 Blatchf. 139; The Marquis of Huntly, 3 Hagg. Adm. 246; Brown *v.* Stapylton, 4 Bing. 119; Revenue Cutter No. 1, 1 Brown Adm. 8; 11 Law. Rep. N. S. 231; The Santissima Trinidad, 7 Wheat. 283.

5 Brown *v.* Stapylton, 4 Bing. 119.

6 Brown *v.* Stapylton, 4 Bing. 119.

7 Harris *v.* Moody, 3 N. Y. 266.

8 Peters *v.* Milligan, Park Ins. 211; Thanas *v.* Royal Ex. Assu. Co. Marl. Dig. 164.

9 Simonds *v.* White, 2 Barn. & C. 805; Scudder *v.* Bradford, 14 Pick. 13.

10 Dodge *v.* Bartol, 5 Me. 286; Cram *v.* Aikin, 13 Me. 229; Hampton *v.* The Thaddeus, 4 Mart. N. S. 582.

11 Harris *v.* Moody, 3 N. Y. 266; Gould *v.* Oliver, 4 Bing. N. C. 134; Brown *v.* Cornwall, 1 Root, 60; Barber *v.* Brace, 3 Conn. 9; Barbour *v.* Dodge, 5 Me. 286; Taunton Cop. Co. *v.* Merch. Ins. Co. 22 Pick. 116; Da Costa *v.* Edmonds, 4 Camp. 142; Milward *v.* Hibbert, 3 Q. B. 120.

12 McAndrews *v.* Thatcher, 3 Wall. 372, distinguishing Bevan *v.* U. S. Bank, 4 Whart. 301; Bedford Com. Ins. Co. *v.* Parker, 2 Pick. 1; Gray *v.* Waln, 2 Serg. & R. 228; Lewis *v.* Williams, 1 Hall, 430; Nelson *v.* Belmont, 21 N. Y. 36.

13 Nelson *v.* Belmont, 5 Duer, 310.

14 Sparks *v.* Kittredge, 9 Law Rep. 318; New Bedford Com. Ins. Co. *v.* Parker, 2 Pick. 9; Douglass *v.* Moody, 9 Mass. 548; Padelford *v.* Boardman, 4 Mass. 550; Giles *v.* Eagle Ins. Co. 2 Met. 143; Plummer *v.* Wildman, 3 Maule & S. 482.

15 The Delaware, 14 Wall. 604; Brooks *v.* Oriental Ins. Co. 7 Pick. 259.

16 Brown *v.* Stapylton, 4 Bing. 119.

§ 300. Contributory values.—The value of the vessel lost is estimated according to her value at the port of departure, making a reasonable allowance for wear and tear on the voyage up to the time of the disaster.[1] The

value as stated in the policy of insurance may be taken, deducting a just and reasonable amount for deterioration.[2] If the ship is sold, her contributory value is her sale price.[3] The vessel is to contribute to four-fifths of its value.[4] As to the losses of the equipments of the vessel, such as masts, cables, and sails, it is usual to deduct one-third from the price of the new articles, as being of greater value than the articles lost.[5] The freight pending at the time of the jettison or other sacrifice contributes, and if wages or provisions are to be subsequently expended, to save freight, such expenses are to be deducted in ascertaining the amount to which freight is to contribute.[6] The freight actually gained or earned at the time a voyage is broken up should be the basis for a rule of contribution.[7] If a vessel be captured, the freight will be chargeable up to the day of such capture.[8] According to the usage of the port of New York, it is proper, in adjusting a case of general average, to take as the contributing value of the freight, one-half of the gross freight agreed to be paid for the voyage.[9] Freight is relieved from contributing in general average upon its gross value, and a lesser one, supposed to have first satisfied the expenses of earning it, is assumed as the contributory valuation.[10] As a general rule, the goods sacrificed, as well as the goods saved, if the vessel arrives at the port of destination, are to be *valued* at the clear net price they would have yielded, after deducting freight, at the port of discharge,[11] or the present value of the goods on board the vessel.[12] Where the property is reshipped and forwarded to the port of destination, they are to be valued at that port.[13] The owner of bank-bills is entitled to recover the par value in the absence of any proof of depreciation, with the interest thereon.[14] Where the same person is owner of both the ship and the cargo, the amount due from the cargo may be deducted from the total loss on the ship by the underwriters.[15] If the ship and cargo perish utterly, an adjustment must be made with reference to the values existing at the time the expenditures were made.[16]

1 Humphreys *v.* Union Ins. Co. 3 Mason, 439; Strong *v.* N. Y. Fire Ins. Co. 1 Johns. 323; Mutual Safe. Ins. Co. *v.* The George, Olcott, 162; Gray *v.* Wain, 2 Serg. & R. 228; The Star of Hope, 9 Wall. 235; Clark *v.* U. S. F. and M. Ins. Co. 7 Mass. 365; Dodge *v.* Union Mar. Ins. Co. 17 Mass. 471.

2 The Star of Hope, 9 Wall. 203.

3 Mut. Safe. Ins. Co. *v.* The George, Olcott, 162; Bell *v.* Smith, 2 Johns. 98.

4 Mut. Safe. Ins. Co. *v.* The George, Olcott, 162, limiting Leavenworth *v.* Delafield, 1 Caines, 573; S. C. 2 Amer. Dec. 201.

5 Strong v. N. Y. Firem. Ins. Co. 11 Johns. 323.

6 The Mary, 1 Sprague, 21; Brown v. Lull, 2 Sum. 448; Spafford v. Dodge, 14 Mass. 66.

7 Maggrath v. Church, 1 Caines, 196; S. C. 2 Amer. Dec. 173; Columbian Ins. Co. v. Ashby, 13 Pet. 331.

8 Leavenworth v. Delafield, 1 Caines, 573; S. C. 2 Amer. Dec. 201.

9 Rathbone v. Fowler, 6 Blatchf. 294.

10 Mut. Safe. Ins. Co. v. The George, Olcott, 171; Leavenworth v. Delafield, 1 Caines, 573; Humphreys v. Union Ins. Co. 3 Mason, 429.

11 The Nathaniel Hooper, 3 Sum. 542; Leavenworth v. Delafield, 1 Caines, 573; S. C. 2 Amer. Dec. 201; Tudor v. Macomber, 14 Pick. 34.

12 Rogers v. Mechs. Ins. Co. 2 Story, 173.

13 Barnard v. Adams, 10 How. 270.

14 Bevan v. Bank of U. S. 4 Whart. 301; Nelson v. Belmont, 5 Duer, 310.

15 Potter v. Prov. Wash. Ins. Co. 4 Mason, 298; Williams v. London Assu. Co. 1 Maule & S. 318; Jumel v. Marine Ins. Co. 7 Johns. 412.

16 Douglass v. Moody, 9 Mass. 548.

§ 301. Adjustment.—The place where average shall be stated depends on accidental circumstances affecting the actual and practical closing of the adventure.[1] An adjustment and settlement of general average at the port of destination binds the parties.[2] An adjustment in a foreign port is conclusive as to the items as well as the apportionment thereof upon the various interests.[3] That an adjustment made in a foreign port is not binding on an insurer.[4] An adjustment of the amount paid for the service, board, traveling, and incidental expenses of an agent sent to assist the master, for the benefit of ship and cargo, made in conformity with usage, was properly allowed.[5] The expenses of an *ex parte* adjustment, made by charterers at the port of delivery, are not chargeable in the admiralty suit, but remain a matter of mutual adjustment between the parties, unless the results were adopted and used by the commissioner.[6] A representation in the nature of an opinion by adjusters as to what will be the result of the whole adjustment will not prevent them from enforcing their bottomry lien.[7] Where adjusters undertake to collect freight, general average, and insurance, and pay the bottomry bond, having it assigned to themselves, it will not be inferred, except on clear proof, that they meant to extinguish the bond as against themselves.[8]

1 Barnard v. Adams, 10 How. 307.

2 Loring v. Neptune Ins. Co. 20 Pick. 411.

3 Peters v. Warren Ins. Co. 2 Sum. 393; S. C. 1 Story, 471; 14 Pet. 112; Thornton v. U. S. 12 Me. 150; Simonds v. White, 2 Barn. & C. 805; Dalglish v. Davidson, 5 Dowl. & R. 6; Loring v. Neptune Ins. Co. 5 Cow. 63; Strong v. Fireman's Ins. Co. 11 Johns. 323; Depau v. Ocean Ins.

Co. 5 Cow. 63. *Contra*, Shiff *v.* Louisiana Ins. Co. 6 Mart. N. S. 629. And see Loring *v.* Neptune Ins. Co. 20 Pick. 411.

4 Thornton *v.* U. S. Ins. Co. 3 Fairf. 150; Lenox *v.* United Ins. Co. 3 Johns. 178; Shiff *v.* Louisiana State Ins. Co. 18 Mart. 629; that it is binding—Strong *v.* N. Y. F. Ins. Co. 11 Johns. 323; Depau *v.* Ocean Ins. Co. 5 Cow. 63; Loring *v.* Neptune Ins. Co. 20 Pick. 411. And see Peters *v.* Warren Ins. Co. 1 Story, 433; Simonds *v.* White, 2 Barn. & C. 805.

5 Hobson *v.* Lord, 92 U. S. 397.

6 The Star of Hope, 9 Wall. 203.

7 The Belle of the Sea, 20 Wall. 421.

8 The Belle of the Sea, 20 Wall. 421.

§ 302. Enforcement of claim. — The master and owners may retain all the goods of the shippers until their share of the contribution towards the average is either paid or secured.[1] The master may retain and cause the sale of the merchandise saved.[2] The lien is terminated by delivery to the consignee.[3] Under the English rule, the master has a lien, but each shipper cannot make him enforce it.[4] The party entitled to contribution has no absolute and unconditional lien upon the goods liable to contribute, but the master has the right to retain them until the general average with which they have been charged is paid or secured; it is a qualified lien dependent on possession.[5] The owner of the cargo jettisoned has a maritime lien on the vessel for its contributive share on adjustment which may be enforced by proceedings *in rem* in admiralty,[6] and the ship-owner is entitled to receive his full loss by a peril incurred without troubling himself about any remedy over.[7] Parties entitled to a contribution can enforce their rights against the proceeds of the property subject to contribution.[8] The general maritime law enforces a contribution in default of any notion of a contract, upon the ground of justice and equity, and is the only mode of remedy in many cases,[9] as when both ship and cargo are owned by the same owner.[10] The action for contribution is founded on the principles of justice,[11] and may be brought in a court of equity or a court of law.[12] The district courts have jurisdiction in the enforcement of liens for a general average.[13] A usage not to indemnify the ship-owner for collecting and paying the contribution is not sustainable.[14]

1 U. S. *v.* Wilder, 3 Sum. 310; Scaife *v.* Tobin, 3 Barn. & Ad. 523; Simonds *v.* White, 2 Barn. & C. 805; The Hoffnung, 6 C. Rob. 383; Strong *v.* N. Y. Firemen's Ins. Co. 11 Johns. 323.

2 Dupont *v.* Vance, 19 How. 162; Strong *v.* N. Y. Firem. Ins. Co. 11 Johns. 323; Simonds *v.* White, 2 Barn. & C. 805; Loring *v.* Neptune Ins. Co. 20 Pick. 411.

3 Dike *v.* The St. Joseph, 6 McLean, 574; Cutler *v.* Rae, 7 How. 729.

4 Dupont *v.* Vance, 19 How. 177; Hallett *v.* Bousfield, 18 Ves. Jr. 187; Simonds *v.* White, 2 Barn. & C. 805.

5 Dupont *v.* Vance, 19 How. 178; Cutler *v.* Rae, 7 How. 729; 8 Ibid. 615.

6 Dupont *v.* Vance, 19 How. 162; The Packet, 3 Mason, 261; U. S. *v.* Wilder, 3 Sum. 311; The Waldo, 2 Ware, (Dav.) 161; The William Gilliam, 2 Low. 154.

7 Potter *v.* Prov. Wash. Ins. Co. 4 Mason, 301; Watson *v.* Mar. Ins. Co. 7 Johns. 57; Maggrath *v.* Church, 1 Caines, 196; Vandenheuvel *v.* United Ins. Co. 1 Johns. 412, disapproving Lapsley *v.* Pleasants, 4 Binn. 502.

8 Mutual Safe. Ins. Co. *v.* The George, Olcott, 97; Strong *v.* N. Y. Firem. Ins. Co. 11 Johns. 323.

9 Mutual Safe. Ins. Co. *v.* The George, Olcott, 96; U. S. *v.* Wilder, 3 Sum. 308; The Packet, 3 Mason, 255; Pope *v.* Nickerson, 3 Story, 506; Beane *v.* Mayurka, 2 Curt. 77; Cutler *v.* Rae, 7 How. 729.

10 Dupont *v.* Vance, 19 How. 178; Potter *v.* Prov. Wash. Ins. Co. 4 Mason, 298. Compare Griswold *v.* Union Mut. Ins. Co. 3 Blatchf. 234; Maggrath *v.* Church, 1 Caines, 196; Jumel *v.* Mar. Ins. Co. 7 Johns. 412; Williams *v.* London Assurance Co. 1 Maule & S. 321.

11 Dupont *v.* Vance, 19 How. 178; Birkley *v.* Presgrave, 1 East, 220; Sturgess *v.* Carey, 2 Curt. 382; Doane *v.* Keating, 2 Leigh, 391.

12 Dupont *v.* Vance, 19 How. 178; Dobson *v.* Wilson, 3 Camp. 480; Price *v.* Noble, 4 Taunt. 123; Hicks *v.* Palington, Moore, 297.

13 Dupont *v.* Vance, 19 How. 171; Rea *v.* Cutler, 1 Sprague, 135; 7 How. 729; 8 Ibid. 615; The Mary, 5 Law. Rep. 75; 6 Ibid. 73; Mut. Safe. Ins. Co. *v.* The George, Olcott, 89; 8 Law Rep. 361; Sparks *v.* Kittredge, 9 Law Rep. 349; The Packet, 3 Mason, 255; The Gold Hunter, Blatchf. & H. 300; The Boston, 1 Sum. 328.

14 Sturgess *v.* Carey, 2 Curt. 385; Eager *v.* Atlas Ins. Co. 14 Pick. 141; Gallatin *v.* Bradford, 1 Bibb. 209; Kendall *v.* Russell, 5 Dana, 504; Jordan *v.* Meredith, 3 Yeates, 318.

of those who engage in a salvage service, and is participated in only by those who actually effect the rescue,[10] and of the property actually charged with it; [11] the allowance for saving a ship or goods from the dangers of the seas, from fire, pirates, or enemies; [12] the compensation allowed to other persons by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss.[13]

1 The H. B. Foster, Abb. Adm. 222.

2 The Emulous, 1 Sum. 210.

3 The Circassian v. Two Ferry Boats, 2 Bond, 375; Taber v. Jenny, 1 Sprague, 315; Abb. Adm. 293.

4 The Clifton, 3 Hagg. Adm. 117.

5 The Blackwell, 10 Wall. 1.

6 Adams v. The Island City, 1 Cliff. 210.

7 The Saragossa, 1 Ben. 557; The Emulous, 1 Sum. 207.

8 The Clarita and Clara, 23 Wall. 1.

9 The Williams, 1 Brown Adm. 217; The Emulous, 1 Sum. 207; The Centurion, 1 Ware, 477; Bearse v. Pigs of Copper, 1 Story, 314; Adams v. The Island City, 1 Cliff. 210; McGinnis v. The Pontiac, 5 McLean, 359; Frets v. Bull, 12 How. 466; The A. D. Patchin, 1 Blatchf. 420; Baker v. Hoag, 7 N. Y. 857; The M. B. Stetson, 1 Low. 119.

10 Waterbury v. Myrick, Blatchf. & H. 44; The San Bernardo, 1 C. Rob. 178.

11 Clarke v. The Dodge Healy, 4 Wash. C. C. 657; Talbot v. Seeman, 1 Cranch, 1.

12 Weeks v. The Catharina Maria, 2 Pet. Adm. 424; Lea v. The Alexander, 2 Paine, 466.

13 Spencer v. The Charles Avery, 1 Bond, 121.

§ 304. Salvors, who are.—A salvor is one who, without any particular relation to a vessel in distress, proffers useful service, and gives it as a voluntary adventurer, without any pre-existing covenant connecting him with the duty of preserving the vessel.[1] They cannot force themselves upon a vessel in distress against the will of the master, but it is at his option to accept or reject their services.[2] Salvors are persons who undertake to save property in peril at the request of the owner or master,[3] and such salvors are under the direction and control of the master, and may be discharged by him on compensation made for work already done; [4] but salvors who are finders take possession primarily, and cannot be dispossessed by master or owner.[5] So the finder of property temporarily left, secured by other parties, will be considered a salvor, if his exertions contribute materially to its preservation.[6] Salvors who are finders may abandon the enterprise without waiting for danger to life, or hopelessness of their efforts;[7] but both salvors and finders are un-

der an implied obligation to use good faith, honesty, skill, and energy in what they do undertake.[8] It is quite immaterial whether the salvors accidentally fall in with the wreck and offer their services, or are called upon by the owners or persons interested in the wreck to aid in saving it.[9] Any sort of person may be a salvor;[10] so the officers and crew of a foreign vessel of war may be salvors;[11] and persons in public employment on a man-of-war,[12] so a revenue officer who seized a vessel, and thereby saved it for the owners.[13] A person whose oxen are used in a salvage service does not thereby become a salvor,[14] nor does one who supplies tools, etc., to assist in the service,[15] or who supplies blocks,[16] nor one who purchases a wreck,[17] nor firemen belonging to the fire department of a city, extinguishing a fire in a ship at the wharf,[18] nor a commercial agent of the owners,[19] but insurance agents may be.[20] A passenger of another boat may be a salvor of a boat which he had no agency in bringing into the position of danger.[21] Seamen belonging to a ship-of-war, discharged at sea to render assistance to a whaling ship, may recover as for salvage services,[22] or seamen employed by the month on a vessel owned by underwriters.[23] If a mate performs salvage service by order of the master, he is considered as a volunteer.[24] An officer in the execution of his duties rendering meritorious services to property in peril is not entitled to salvage.[25] To found a title for compensation, there must be either some direct, extraordinary assistance or expense, independent of official duty, or some positive statute enactment in point;[26] but it is a question whether compensation could be had for salvage of goods on land.[27]

1 The Wave v. Hyer, 2 Paine, 131; S. C. reversed, Blatchf. & H. 235; 7 N. Y. Leg. Obs. 97; The Charles, Newb. 333; The Neptune, 1 Hagg. Adm. 227; Lea v. Alexander, 2 Paine, 472; Hobart v. Drogan, 10 Pet. 108; The Clarita and Clara, 23 Wall. 1; The Acorn, 3 Ware, 99.

2 The Susan, 1 Sprague, 499; S. C. 12 Law Rep. N. S. 531.

3 The Ida L. Howard, 1 Low. 3; The Louisa Jane, 2 Low. 296.

4 The Ida L. Howard, 1 Low. 3.

5 The Ida L. Howard, 1 Low. 3.

6 Cromwell v. The Island City, 1 Cliff. 221.

7 The Ida L. Howard, 1 Low. 3.

8 The Ida L. Howard, 1 Low. 3.

9 The A. D. Patchin, 1 Blatchf. 429; The Centurion, 1 Ware, 477.

10 The Aroma Mills, 2 Hughes, 41; Mason v. The Blaireau, 2 Cranch, 240; Bell v. The Ann, 2 Pet. Adm. 278; The Columbine, 2 W. Rob. 186.

11 The Huntress, 4 Pa. L. J. 510; Talbot v. Seeman, 1 Cranch, 1.

12 The Aroma Mills, 2 Hughes, 40; U. S. v. The Amistad, 15 Pet. 518; The Thetis, 3 Hagg. Adm. 14; The Wilsons, 1 W. Rob. 172.

13 Le Tigre, 3 Wash. C. C. 567.

14 The Ottawa, 1 Low. 274.

15 The Ottawa, 1 Low. 277; The Charlotte, 3 W. Rob. 68; The Vine, 2 Hagg. Adm. 1.

16 Squire v. Tons of Iron, 2 Ben. 24; The Independence, 2 Curt. 356.

17 Benjamin v. The Watchman, 11 Law Rep. N. S. 40.

18 Davey v. The Mary Frost, 2 Woods, 306.

19 The Lady Worsley, 2 Spinks Adm. 253.

20 The Aroma Mills, 2 Hughes, 40; The Traveller, 3 Hagg. Adm. 370.

21 McGinnis v. The Pontiac, Newb. 130.

22 The Harvest, 1 Sprague, 53.

23 Bowley v. Goddard, 1 Low. 154.

24 Williamson v. The Alphonso, 1 Curt. 376.

25 The Wave, Blatchf. & H. 253; Le Tigre, 3 Wash. C. C. 567.

26 Ex parte Cahoone, 2 Mason, 87; The Aquila, 1 C. Rob. 32.

27 Ex parte Cahoone, 2 Mason, 88; Nicholson v. Chapman, 2 H. Black. 254.

§ 305. Persons connected with the vessel.—Passengers and crew in extraordinary cases only may be salvors.[1] It is the duty of passengers to contribute to the general safety in the event of a common peril;[2] and they are not allowed to claim salvage for ordinary labor performed by them,[3] nor for ordinary assistance they may offer in distress,[4] but extraordinary services entitle them to salvage.[5] Any exception to the rule that a passenger cannot be a salvor must be admitted with great caution.[6] Where a passenger, a master-navigator, assumed command of a ship of great value during a violent storm, after the master and other officers had been lost, he may be regarded as a salvor.[7] A man may personally be on board a ship and be neither master, crew, nor cargo, and yet not sustain the legal relation of passenger.[8] The relation sustained by troops to the ship transporting them is not that of passengers, within the rule which denies compensation to passengers.[9]

1 The Aroma Mills, 2 Hughes, 40; The Wave, 2 Paine, 131; The Neptune, 1 Hagg. Adm. 227; The Joseph Harvey, 1 C. Rob. 257; The Waterloo, 2 Dodd. 433.

2 Beane v. The Mayurka, 2 Curt. 78; The Branston, 2 Hagg. Adm. 3.

3 The Mermaid, 1 Ben. 205; The Neptune, 1 Hagg. Adm. 227.

4 The Branston, 2 Hagg. Adm. 3.

5 The Two Friends, 1 C. Rob. 271; Bond v. The Cora, 2 Wash. C. C. 80; Clayton v. The Harmony, 1 Pet. Adm. 70.

6 Brady v. American S. S. Co. 1 Amer. L. T. N. S. 462.

7 Brady v. American S. S. Co. 1 Amer. L. T. N. S. 462; The Amanta sia, 1 Ben. 146.

8 The Merrimac, 1 Ben. 206; The Anastasia, 1 Ben. 168; The Hanna, 15 Law Ti. 334.

9 The Merrimac, 1 Ben. 201.

§ 306. Seamen as salvors.—Seamen generally cannot be salvors of their own vessel.[1] For ordinary exertions in the discharge of their duty, the crew are not entitled to salvage;[2] but the character of seamen does not create an incapacity to become salvors.[3] They are not absolutely disqualified from claiming as salvors for extraordinary exertions in cases highly perilous.[4] There may be cases where seamen may be salvors,[5] by performing services beyond the line of their duty; as when one seaman remains on the wreck after abandonment, and aids in saving her.[6] So if a ship be abandoned at sea, and deserted by all her crew except one or two, and these remain on board and save her, or materially assist in saving her.[7] So if some of the crew return to her and save her.[8] But if all the seamen except one desert during a gale, he simply performing his duty by staying by the vessel, it did not entitle him to salvage.[9] Where the crew was abandoned by the master, and the vessel was afterward stranded, and the men with considerable difficulty and danger saved the vessel, they were deemed salvors.[10] If a ship seized under an assumed authority is recaptured by the crew, they are entitled to salvage.[11] Seamen may be salvors after their contract of service is dissolved,[12] either voluntarily by the master, or by the effect of a *vis major*,[13] when their connection with the vessel is entirely broken up.[14] Extraordinary circumstances may occur, in which their connection with the vessel may be dissolved *de facto*, or by operation of law, in which case they may claim as salvors.[15] Seamen compensated by a share of the freight cannot be salvors; the only compensation they can demand is payment by the day for the time they are engaged in saving the property.[16] It is highly politic to give the mariners either saving from wreck or recovering by recapture and restoring property, a liberal salvage, beyond a mere *quantum meruerint*;[17] but they cannot be deemed salvors except under extraordinary circumstances.[18] Although seamen are bound to save the ship and goods wrecked, yet they are entitled to a further compensation in the nature of salvage[19] when goods have been saved and brought into port.[20] The claim of the seaman is not under his contract for wages, but in a new character as salvor he regains a rightful claim to wages restored by rescuing the articles from peril and loss to which the wreck exposed them.[21] No claim for salvage can be maintained by the crew on the ground that by their services the ves-

sel is brought through a storm into a port, sound in hull.[22] A seaman cannot have salvage for the boat which has brought him to land after the wreck of his ship.[23]

1 Miller v. Kelly, Abb. Adm. 564; The John Perkins, 9 Law Rep. N. S. 490; 21 Law Rep. 99.

2 The Two Catherines, 2 Mason, 335; Newman v. Walters, 3 Bos. & P. 612; Mason v. The Blaireau, 2 Cranch, 240. And see Giles v. The Cynthia, 1 Pet. Adm. 203; Weeks v. The Catharina Maria, 2 Pet. Adm. 424; Hobart v. Drogan, 10 Pet. 108; The Holder Borden, 1 Sprague, 144; The Wave v. Hyer, 2 Paine, 140; The Joseph Harvey, 1 C. Rob. 257.

3 The Dawn, 2 Ware, 129, explaining Hobart v. Drogan, 10 Pet. 108. And see Drew v. Pope, 2 Sawy. 74; The Neptune, 1 Hagg. Adm. 227; The Two Catherines, 2 Mason, 335.

4 The Two Catherines, 2 Mason, 319. And see Taylor v. The Cato, 1 Pet. Adm. 48; Clayton v. The Harmony, Ibid. 70; Montgomery v. The T. P. Leathers, Newb. 421; The John Perkins, 9 Law Rep. N. S. 490; The Taylor, Newb. 341; The Wave v. Hyer, 2 Paine, 140; Dulano v. Peraglo, Bee, 212; Le Tigre, 3 Wash. C. C. 567; The Joseph Harvey, 1 C. Rob. 257.

5 The Massasoit, 1 Sprague, 98; The Neptune, 1 Hagg. Adm. 227; The Two Catherines, 2 Mason, 319; Mason v. The Blaireau, 2 Cranch, 240. *Contra*, Taylor v. The Cato, 1 Pet. Adm. 48.

6 Mason v. The Blaireau, 2 Cranch, 240; Hobart v. Drogan, 1 Pet. 108; Taylor v. The Cato, 1 Pet. Adm. 48; Clayton v. The Harmony, 1 Pet. Adm. 79; The Neptune, 1 Hagg. Adm. 227; The Two Catherines, 2 Mason, 319.

7 Mason v. The Blaireau, 2 Cranch, 240; The Triumph, 1 Sprague, 428, distinguishing The John Perkins, 11 Law Rep. N. S. 87. And see Hobart v. Drogan, 10 Pet. 108.

8 The Florence, 20 Eng. L. & E. 607.

9 The John Perkins, 11 Law Rep. N. S. 87; Clarke v. The Dodge Healy, 4 Wash. C. C. 651; The Emulous, 1 Sum. 207; Lewis v. The Elizabeth and Jane, 1 Ware, 41; The Aquila, 1 C. Rob. 39.

10 The Olive Branch, 1 Low. 286.

11 Williams v. Suffolk Ins. Co. 3 Sum. 270; S. C. 1 Law Rep. 153; 13 Pet. 415. And see Clayton v. The Harmony, Bee, 70.

12 Mason v. The Blaireau, 2 Cranch, 240; Hobart v. Drogan, 10 Pet. 122; The Triumph, 1 Sprague, 428; S. C. 11 Law Rep. N. S. 612; The John Perkins, 9 Law Rep. N. S. 490; Cartwell v. The John Taylor, Newb. 341; The Neptune, 1 Hagg. Adm. 227.

13 The Olive Branch, 1 Low. 287; Mason v. The Blaireau, 2 Cranch, 240; The Triumph, 1 Sprague, 428; The Florence, 20 Eng. L. & E. 607; The Warrior, 1 Lush. 476; The John Perkins, 21 Law Rep. 87; Phillips v. McCall, 4 Wash. C. C. 147; The Acorn, 3 Ware, 98.

14 The Antelope, 1 Low. 130; The Olive Branch, Ibid. 286.

15 Hobart v. Drogan, 10 Pet. 122; The Two Catherines, 2 Mason, 339; Newman v. Walters, 3 Bos. & P. 612.

16 Reed v. Hussey, Blatchf. & H. 543; Montgomery v. Tyson, 1 Low. 131; The Holder Borden, 1 Sprague, 144; The Antelope, 10 Wheat. 66.

17 Clayton v. The Harmony, 1 Pet. Adm. 80; Warder v. La Belle Creole, 1 Pet. Adm. 31; Brevoor v. The Fair American, 1 Pet. Adm. 90.

18 The Holder Borden, 1 Sprague, 149; The Massasoit, 1 Sprague, 97; The Neptune, 1 Hagg. Adm. 227; The Reliance, 2 W. Rob. 119.

19 Bell *v.* The Ann, 2 Pet. Adm. 280; Clayton *v.* The Harmony, 1 Pet. Adm. 79; Taylor *v.* The Cato, Ibid. 48; Bond *v.* The Cora, 2 Wash. C. C. 80; Weeks *v.* The Catharina Maria, 2 Pet. Adm. 427; The Dawn, 2 Ware (Dav.) 121; The Dawn, 4 Law Rep. 106; The Neptune, 1 Hagg. Adm. 227; Lewis *v.* The Elizabeth and Jane, 1 Ware, 44; Drew *v.* Pope, 2 Sawy. 73; The Massasoit, 1 Sprague, 97; The Two Catherines, 2 Mason, 339; The Saratoga, 2 Gall. 183; Coffin *v.* Stover, 5 Mass. 252; The Saratoga, 2 Gall. 164, denying Frothingham *v.* Prince, 3 Mass. 563. See *ante*, § 168.

20 Weeks *v.* The Catharina Maria, 2 Pet. Adm. 426; Bell *v.* The Ann, 2 Ibid. 278; Bond *v.* The Cora, Ibid. 361; Warder *v.* La Belle Creole, 1 Pet. Adm. 31; Taylor *v.* The Cato, 1 Pet. Adm. 48.

21 Taylor *v.* The Cato, 1 Pet. Adm. 48; The John Taylor, Newb. 344; The Two Catherines, 2 Mason, 319; Frothingham *v.* Prince, 3 Mass. 563.

22 Miller *v.* Kelly, Abb. Adm. 566; The Neptune, 1 Hagg. Adm. 227; The Branston, 2 Hagg. Adm. 3; Hobart *v.* Drogan, 10 Pet. 108.

23 Price *v.* Sears, 2 Low. 553.

§ 307. Pilots as salvors.—In extraordinary cases it may be difficult to distinguish a case of pilotage from a case of salvage, properly so called, for it is possible that the safe conduct of a ship into port under circumstances of extreme danger and personal exertion may exalt a pilotage service into something of a salvage service,[1] as in cases of extraordinary peril, and the exercise of gallantry beyond the limits of their duty,[2] the circumstance must be such as require efforts, perils to be encountered, labor, and skill out of the line of their duty.[3] When they become salvors, public policy requires that they should be held strictly to a discharge of their duties.[4] Pilots or engineers of steam-boats belonging to the ship's company are not included within the exception to the rule by which pilots in the usual mode of navigation have in some instances been admitted as salvors. In emergencies they are held to the same exertions for the preservation of life and property as common seamen,[5] but his contract is virtually dissolved when the boat being on fire is surrendered by the master to another boat to save her, and after such surrender the pilot may be a salvor.[6] By the general maritime law, a pilot is not bound to give his services to a vessel disabled and in distress for mere pilotage.[7] It is expedient that pilots should be encouraged to go out for the assistance of vessels in distress.[8] Where the master of a vessel in distress signaled for a pilot, the service was in the nature of a salvage service.[9] Such service will entitle him to be considered something of a salvor.[10] The pilot who safely conducts into port a vessel in distress at sea, acts in the performance of an ordinary duty, but if he goes beyond his ordinary duty he is entitled to salvage.[11]

1 The Wave, Blatchf. & H. 243; The Joseph Harvey, 1 C. Rob. 257; The Eleanor, 6 C. Rob. 33; The Benjamin Franklin, 6 C. Rob. 350; The Nelson, 1 Hagg. Adm. 169; Hand v. The Elvira, Gilp. 60; Dulany v. The Peragio, Bee, 212; Le Tigre, 3 Wash. C. C. 567; The Anne, 1 Mason, 506; Lea v. The Alexander, 2 Paine, 470; The Two Catherines, 2 Mason, 236; Newman v. Walters, 3 Bos. & P. 612; Hobart v. Drogan, 10 Pet. 123; The Aroma Mills, 2 Hughes, 40; The Grace Brown, 2 Hughes, 112; The Salacia, 2 Hagg. Adm. 270.

2 The Centurion, 1 Ware, 481; The Joseph Harvey, 1 C. Rob. 257; Le Tigre, 3 Wash. C. C. 567; Hobart v. Drogan, 10 Pet. 108; The Two Catherines, 2 Mason, 219; Mason v. The Blaireau, 2 Cranch, 240; Phillips v. McCall, 4 Wash. C. C. 148.

3 Hope v. The Dido, 2 Paine, 246; Hobart v. Drogan, 10 Pet. 108; Lea v. Alexander, 2 Paine, 470; The Joseph Harvey, 1 C. Rob. 257; Le Tigre, 3 Wash. C. C. 567; Dulany v. The Peragio, Bee, 212; Hand v. The Elvira, Gilp. 60.

4 Hope v. The Dido, 2 Paine, 243; Lea v. Alexander, Ibid. 466.

5 Mesner v. The Suffolk Bank, 1 Law Rep. 249.

6 Montgomery v. The D. P. Leathers, Newb. 421.

7 The Susan, 1 Sprague, 501; S. C. 12 Law Rep. N. S. 531; The Hebe, 2 W. Rob. 148, 247; Flanders v. Tripp, 2 Low. 15; The Frederick, 1 W. Rob. 16; Hobart v. Drogan, 10 Pet. 108; The Wave v. Hyer, 2 Paine, 131; Hope v. The Dido, 2 Paine, 243; Lea v. The Alexander, 2 Paine, 466; The Jouge Andries, Swabey, 226; S. C. 11 Moore P. C. 313; The Richmond, 3 Hagg. Adm. 431; The Hebe, 2 W. Rob. 246; Love v. Hinckley, Abb. Adm. 436; Hand v. The Elvira, Gilp. 60. And see Chapman v. Lucerne, 39 Hunt's Mer. Mag. 382.

8 The Wave, Blatchf. & H. 244; The Sarah, 1 C. Rob. 313, note; Dulany v. The Peragio, Bee, 212.

9 The Susan, 1 Sprague, 501; The Haedwig, 24 Eng. L. & E. 582.

10 Hand v. The Elvira, Gilp. 69; The Joseph Harvey, 1 C. Rob. 257.

11 Le Tigre, 3 Wash. C. C. 571; The Belle, Edw. Adm. 46.

§ 308. Towage as salvage.—A steam-tug is not bound to take a vessel in tow, at extraordinary risk to herself and crew; and if she do so it is a salvage service, and not mere towage.[1] The amount of danger is important as a reasonable test of the probable contract.[2] So long as it is reasonably safe to take a vessel in tow anywhere on the pilot grounds, the tug is not entitled to compensation therefor.[3] But if she takes extra risk, or rescues a vessel from danger of wreck, she is entitled to salvage.[4] Extraordinary towage is that which demands extra labor.[5] A steamer employed in towing about a harbor does not stand precisely on the same footing in respect to salvage service as a vessel kept for purposes of saving life and property, or a steamer deviating from an important voyage to give aid to a vessel in distress.[6] Services by a tug engaged in the wrecking business are salvage services.[7] Towing may be a salvage service when performed in aid of a vessel in distress.[8] Taking a vessel disabled and in distress cannot by possibility be compared to an

ordinary towage service[9] if it leads to the rescue of the vessel from danger,[10] as towing a vessel off the rocks and into a harbor.[11] The mere fact that the vessel is aground is enough to show that she is in a situation to require salvage services.[12] So a steam-tug relieving another tug which lay disabled in a harbor.[13] Where a vessel has received any injury or damage, a service rendered to her is not mere towage, but salvage,[14] as where the blades of the screw of a steamer were broken.[15] So where a steam vessel has lost the use of her machinery, although she is sound in hull and masts, and has the use of her sails, the towing is a salvage service.[16] But where a vessel was dismasted, and rigged with jury-masts, towing her to a place of safety was not a salvage service, as it did not lead to the rescue of the vessel from danger.[17] Where a vessel in distress was being towed into a port of safety, but she fraudulently cut the hawser, and another steamer towed her into port, both steamers were entitled to salvage.[18] If a vessel in need of salvage assistance signals for a steamer, it is to be construed as a signal for assistance, although not necessarily one of distress, and the service is one of salvage.[19] When the signal was for a tug, which went to her assistance, and rescued her from an impending peril, it was a salvage service.[20] If a signal is given and persons go out to render assistance, their services cannot be rejected as unnecessary.[21] The going to the ship is a part of the service, as much as the labor after arrival.[22] Services performed in towing a steamboat from her moorings at the wharf, to save her from contact with a vessel on fire descending the river, is a towage, and not a salvage service.[23] So a steam-tug having through her own fault set a schooner on fire, has no claim for salvage for putting the fire out.[24] Although an abandoned vessel might have been saved, by her crew returning to her, had the steamer not gone to her aid, it is a case of salvage.[25]

1 Roff *v.* Wass, 2 Sawy. 394; The Wave, 2 Paine, 131; Blatchf. & H. 235; The Alexander, Blatchf. & H. 466; Le Tigre, 3 Wash. C. C. 567; Hobart *v.* Drogan, 10 Pet. 108; The Foster, 1 Abb. Adm. 222; The Emily B. Souder, 7 Blatchf. 555; The Charlotte, 3 W. Rob. 68; The Reward, 1 W. Rob. 174; The Charles Adolphe, Swabey, 153.

2 The M. B. Stetson, 1 Low. 122; The Princess Alice, 3 W. Rob. 138; The James Talbott, 2 Sprague, 101; The Reward, 1 W. Rob. 174; The Isabella, 3 Hagg. Adm. 427; The Charles Adolphe, Swabey, 153.

3 Roff *v.* Wass, 2 Sawy. 389.

4 Roff *v.* Wass, 2 Sawy. 389.

5 The Williams, 1 Brown Adm. 218; The Princess Alice, 3 W. Rob 138; The Kelly, 1 Eng. L. & E. 596; The Kingalock, 1 Spinks Ec. & Ad 263; The Versailles, 1 Curt. 353.

6 The M. B. Stetson, 1 Low. 123; The H. B. Foster, Abb. Adm. 222.

7 The Birdie, 7 Blatchf. 238.

8 The H. B. Foster, Abb. Adm. 222; S. C. 6 N. Y. Leg. Obs. 223; The Reward, 1 W. Rob. 176; The Graces, 2 W. Rob. 294; The Meg Merriles, 3 Hagg. Adm. 346; The Jane, 2 Hagg. Adm. 338; The Traveller, 3 Ibid. 370; The London Merchant, 3 Hagg. Adm. 401.

9 The Rebecca Clyde, 5 Ben. 103; The Charles Adolphe, Swabey, 153; The Paris, 1 Spinks Ec. & Ad. 289.

10 The H. B. Foster, Abb. Adm. 229; The Industry, 3 Hagg. Adm. 203; The Isabella, 3 Hagg. Adm. 427; The Sussex, 3 Hagg. Adm. 339.

11 The H. B. Foster, Abb. Adm. 228; The London Merchant, 3 Hagg. Adm. 394; The Meg Merriles, 3 Hagg. Adm. 346; The Earl Grey, Ibid. 386; The Traveler, Ibid. 370.

12 The M. B. Stetson, 1 Low. 122. And see James *v.* Abbott, 2 Sprague, 101; The Reward, 1 W. Rob. 174; The Isabella, 2 C. Rob. 241; The Charles Adolphe, Swabey, 153.

13 Sturgis *v.* The Joseph Johnson, 19 How. Pr. 229.

14 The Saragossa, 1 Ben. 551.

15 The Emily B. Souder, 7 Ben. 550.

16 The Saragossa, 1 Ben. 551; The Emily B. Souder, 7 Ben. 555; The Charles Adolphe, Swabey, 153; The Reward, 1 W. Rob. 177; The Charlotte, 3 W. Rob. 71.

17 The Rebecca Clyde, 5 Ben. 103, distinguishing The Isabella, 3 Hagg. Adm. 427; The Reward, 1 W. Rob. 177.

18 The Gary *v.* The Sherman, Chase Dec. 468.

19 The James T. Abbott, 2 Sprague, 101; Phillips *v.* The U. S. 33 Hunt's Mer. Mag. 456.

20 Phillips *v.* The U. S. 33 Hunt's Mer. Mag. 456; The Williams, 1 Brown Adm. 225; The Susan, 1 Sprague, 499; The Undaunted, Lush. 90.

21 The Williams, 1 Brown Adm. 225; The Susan, 1 Sprague, 499; The Undaunted, Lush. 90.

22 The Williams, 1 Brown Adm. 218; The White Star, Law Rep. 1 Ad. & E. 68; The Banner, 14 Law Rep. 465; The Susan, 1 Sprague, 499.

23 Stevens *v.* The S. W. Downs, Newb. 458.

24 The Prince Albert, 5 Ben. 386; The Iola, 4 Blatchf. 31; Cargo ex Capella, Law Rep. 1 Ad. & E. 356.

25 Holmes *v.* The Joseph C. Griggs, 1 Ben. 81.

§ 309. Salvage services. — Whenever service has been rendered in saving property on the sea, the service is, in the sense of the maritime law, a salvage service;[1] so, assistance needed and rendered is in the nature of salvage service,[2] if effectually rendered in saving the vessel and cargo, or any part of either, from impending destruction or loss.[3] Assistance rendered by a steam-tug, carrying the fire-department engines, in extinguishing a fire in a vessel lying at anchor in port, is a salvage service;[4] so, putting hands on board a vessel infected with yellow fever;[5] so, where a vessel at sea approaches a vessel in distress, and finding all the officers disabled, sent her own mate on board, who brought the vessel into port.[6] When

a ship and its lading is saved from an impending peril by the service of any person upon whom there is no obligation to render the service, it is a salvage service.[7] Services rendered by steamers to a stranded vessel are in the nature of salvage services,[8] in towing and otherwise assisting vessels in danger,[9] although but slightly disabled,[10] or by a steam-tug owned by a corporation engaged in the wrecking business.[11] Where a vessel, greatly damaged by a storm, showing a flag of distress, was towed into port by another vessel at considerable loss of time and expense, it was a salvage service.[12] So, services rendered after reaching a port of safety in towage to where repairs could be made, are towage and not salvage services.[13] So, where a vessel driven on an island in a harbor set her colors union down, and was pulled off and towed to her dock;[14] so, services to a dismantled vessel by taking her to a safe place, and then informing her owners of her condition;[15] so, the rescue of a steam ferry-boat,[16] and barges broken loose and adrift in a river;[17] so the rescue of a raft floating out to sea unaccompanied by any person,[18] but not in rescuing a raft broken loose from its moorings and afloat in a river;[19] but if sawed into boards by salvors, whose acts were affirmed by the owners, it would entitle them to salvage compensation.[20] So, pulling boilers out of a river, are salvage services.[21]

1 The Narragansett, Olcott, 390; The Emulous, 1 Sum. 207.

2 The Susan, 1 Sprague, 502; Lea v. The Alexander, 2 Paine, 466; Callagan v. Hallett, 1 Caines, 104.

3 Spencer v. The Charles Avery, 1 Bond, 121; McGinnis v. The Pontiac, New. 130; Spencer v. The Charles Avery, 1 Bond, 119.

4 The Blackwall, 10 Wall. 1; The Rosalie, Spinks Ec. & Ald. 185; The Eastern Monarch, Lush. 81; The Tees, Lush. 505.

5 The Skiblander, Law Rep. 3 P. D. 24.

6 The J. L. Brown, 5 Ben. 296.

7 Phillips v. The U. S. 33 Hunt's Mer. Mag. 456.

8 The Underwriter, 4 Blatchf. 94.

9 The Joseph C. Griggs, 1 Ben. 81; The Saragossa, Ibid. 553; Seaman v. The Erie R. R. Co. 2 Ben. 128.

10 The Emily B. Souder, 7 Ben. 550.

11 The Birdie, 7 Blatchf. 238.

12 The Rebecca Clyde, 5 Ben. 98.

13 The W. F. Garrison, 1 Low. 139.

14 The B. M. Stetson, 1 Low. 119.

15 Norris v. The Island City, 1 Cliff. 219.

16 Cheeseman v. Two Ferry Boats, 2 Bond, 363.

17 Huber v. Coal Barges, 3 Amer. Law Tl. 109; 2 Biss. 297; The Union Express, 1 Brown Adm. 516.

18 A Raft of Spars, Abb. Adm. 457; A Raft of Timber, 2 W. Rob. 251. And see Warning v. Clark, 5 How. 441; The Wave, 2 Paine, 151; S. C. Blatchf. & H. 235; Fifty Thousand Feet of Timber, 2 Low. 64.

19 Tome v. Cribs of Lumber, Taney, 533; Nicholson v. Chapman, 2 H. Black. 254,; The Branston, 2 Hagg. Adm. 3; Beane v. The Mayurka, 2 Curt. 78.

20 Tome v. Dubois, 6 Wall. 548.

21 The Silver Spray's Boilers, 1 Brown Adm. 349.

§ 310. Instances.—Where the master of a vessel was killed in an affray, and the second mate so badly hurt as to be incapable of doing duty, and the first mate hurt, but he took command and headed the vessel to port, signaling a passing vessel for relief, which afforded the relief; the mate and the salving vessel had performed salvage services.[1] In all cases where services are rendered in saving property in danger of being lost on the high seas, or when wrecked or stranded on the shore, it is, in the sense of the maritime law, a salvage service.[2] To constitute a salvage service, it is not necessary that a vessel, whether sailing or steam, should be unnavigable, or that a steam vessel should be injured, not merely in her machinery, but in her hull, or her sails.[3] A steamboat, having been dismantled and stripped of her boiler, engine, and paddle-wheels, was fitted up as a saloon and hotel, and while being towed to another locality, there to be used for a similar purpose, is not a subject for salvage service, as not being engaged in commerce and navigation.[4] Where the owner abandoned all effort to save her, and a third party, at his own risk and expense, gets her off and repairs her, it is in the nature of salvage services.[5] Where a stranded steamer employs another to get her off, herself furnishing some of the necessary motor-power and directs the movements, the hired vessel does not run the risks of salvage service.[6] A vessel, in point of fact for twelve or fourteen hours in a condition where her instant destruction was menaced, and the lives of those who might remain on board were greatly jeopardized, may be rightly taken possession of by salvors.[7] A barge, without a small boat or any means of propulsion, adrift, although she came to anchor and the weather was good, was in a situation to have salvage service performed; but an adjustment of the same by the owner of the cargo was not binding on the vessel.[8] Salvage was allowed in a case where the vessel and cargo was found waterlogged, abandoned, and apparently—though, in fact, not—derelict.[9] A wrecking steamer, wrecked on a salving enterprise, may be the subject of salvage by the company which chartered it.[10]

1 The J. L. Bowen, 5 Ben. 286; The Janet Mitchell, Swabey, 111; The Osarina, 2 Sprague, 43; Williamson v. The Alphonso, 1 Curt. 376; The Roe, Swabey, 84; The Golondrina, Law Rep. 1 Ad. & E. 234.

2 The Independence, 2 Curt. 355; The Centurion, 1 Ware, 477; The Emulous, 1 Sum. 207; Bearse v. Pigs of Copper, 1 Story, 314; The Pontiac, Newb. 137; S. C. 5 McLean, 367.

3 The Saragossa, 1 Ben. 551; The Emily B. Souder, 7 Ben. 555.

4 The Hendrick Hudson, 3 Ben. 419.

5 Barney v. Eaton, 1 Biss. 242.

6 The Virginia, 3 Biss. 49.

7 The John Gilpin, Olcott, 80; Clarke v. The Dodge Healy, 4 Wash. C. C. 651.

8 The Union Express, 1 Brown Adm. 516.

9 The Senator, 1 Brown Adm. 372.

10 The Aroma Mills, 2 Hughes, 30.

§ 311. What not a salvage service. — Successful exertions by the crew of one vessel to avoid an impending collision with another are not salvage services.[1] Upon a collision, each vessel is bound to render to the other any aid necessary.[2] Where two vessels at anchor came into collision, without fault, and to prevent destruction one of them slipped her cable and went ashore, no claim for a salvage service arises as against the other vessel.[3] A vessel condemned in damages for a collision will not be allowed salvage for rescuing and towing the injured vessel to a place of safety.[4] Where a vessel has not received any injury or damage, and is in the same condition she would ordinarily be in, a service rendered to her is not a salvage service.[5] Where a salvor acts under a misapprehension of abandonment of a Government barge, and the goods are not in imminent peril, no salvage will be allowed.[6]

1 The John Perkins, 11 Law Rep. N. S. 67; The Acorn, Ibid. 99; Beane v. The Mayurka, 2 Curt. 78; The Two Catherines, 2 Mason, 337; The Dawn, 2 Ware, (Dav.) 137; The Calypso, 2 Hagg. Adm. 217.

2 The Clarita and Clara, 23 Wall. 1.

3 Beane v. The Mayurka, 2 Curt. 72.

4 The Sampson, 4 Blatchf. 28.

5 The Saragossa, 1 Ben. 551.

6 Bryan v. U. S. 6 Ct. of Cl. 128.

§ 312. Duty of salvors.—Salvors are under implied obligations to use good faith, honesty, skill, and energy in their undertaking;[1] to land property saved at the nearest port of safety, and see that it is properly cared for;[2] but due regard should be paid by the salvors to the convenience of the owners in determining to what port the vessel should be taken.[3] The salvor should not retain posses-

sion of the property to the detriment thereof, or the inconvenience of the master and crew.[4] They are required to exercise the same degree of care in keeping the property placed in their custody as a prudent man ordinarily exercises in keeping his own, and negligence in this respect either diminishes the reward, or works a total forfeiture of salvage.[5] They are bound, in good faith, to consult the interest of the owner, as well as their own.[6] In stripping an abandoned vessel of her apparel and furniture, salvors are bound to the exercise of reasonable care.[7] A vessel undertaking in good faith to perform the office of salvor, is not responsible for the latter having been wholly lost in the effort to save her.[8]

1 The Ida L. Howard, 1 Low. 3; The John Perkins, 3 Ware, 89.

2 The Sumner's Apparel, 1 Brown Adm. 52.

3 The Eleonora Charlotta, 1 Hagg. Adm. 156. And see L'Esperance, 1 Dods. 46.

4 The Lady Worsley, 2 Spinks Adm. 253; The Eleanora Charlotta, 1 Hagg. Adm. 156.

5 The Mulhouse, 12 Law Rep. N. S. 276.

6 The Amethyst, 2 Ware, (Dav.) 20.

7 The Sumner's Apparel, 1 Brown Adm. 52.

8 The Laura, 14 Wall. 336.

§ 313. Rival salvors.—Where the property is actually saved, and more than one set of salvors have contributed to that result, all engaged in the enterprise who materially contributed to the saving are entitled to share in the reward, in proportion to the nature, duration, risk, and value of the services rendered,[1] although the separate service of either set would not have saved the property.[2] Where five distinct sets of salvors took part in shipping and unloading a vessel, they have not distinct liens, but all are entitled to be paid out of all the property saved.[3] Where a vessel, disabled at sea, was partially aided by one vessel, further assisted by another, and, discovered derelict, was by a third vessel rescued, all are entitled to share in the award.[4] Where a dismantled bark, without rudder or anchor, was taken by a schooner to a safe position; and afterward saved by another vessel, the schooner was entitled to a liberal compensation.[5] Parties who find a vessel derelict, and rescue her, are entitled to salvage, without regard to meritorious but unsuccessful efforts of parties previously made.[6] Salvors wrongfully interrupted by other salvors will be treated as the true salvors.[7] Where the master and crew of a vessel are able to preserve and bring her into port, other salvors have no right

to interfere with them, unless it appear the rescue could not be made without their aid.[8] If, in effecting a salvage, the salvors fall into distress, and are relieved by others, they do not lose their original right to salvage. The second salvors partake in proportion to their merit.[9] Second salvors cannot impose conditions that the first salvors shall abandon all claims to salvage.[10]

1 Norris *v.* The Island City, 1 Cliff. 219; Dorning *v.* The Anchors, 1 Ben. 77; The Blackwall, 10 Wall. 1.

2 Adams *v.* The Island City, 1 Cliff. 210; 1 Black, 121.

3 The Albion Lincoln, 1 Low. 71.

4 The Island City, 1 Black, 121.

5 Norris *v.* The Island City, 1 Cliff. 219.

6 The Island City, 1 Black, 121.

7 The John Gilpin, Olcott, 77; A Quantity of Iron, 14 Law Rep. N. S. 566.

8 Hand *v.* The Elvira, Gilp. 60.

9 The Henry Ewbank, 1 Sum. 400; The Jonge Bastiaan, 5 C. Rob. 269.

10 The Henry Ewbank, 1 Sum. 400.

§ 314. The peril.—To be in a condition authorizing a salvage service, a vessel must be subject to something more than the ordinary peril of the sea.[1] To entitle to salvage, it is not necessary that the loss should be inevitably certain, nor that the danger should be real and imminent.[2] It is sufficient if damage or misfortune might expose the vessel to destruction.[3] A situation of actual apprehension, though not of actual danger, makes a case of salvage compensation.[4] Prospective and possible calamity do not constitute a case of peril, especially where the resources for aid and relief are at hand.[5] Mere speculative danger is insufficient, but it need not be such that escape from it by other means was impossible.[6] The peril depends more on the actual situation of the derelict property than the intent with which it was abandoned.[7] The fact that the peril was slight and the duration of the service brief does not prevent the case from being one of salvage.[8] Where, in the opinion of the crew, the vessel would have been saved by them if the steamer had not gone to her, this will not defeat a salvage claim.[9] Where well founded reasons existed for believing that a neutral vessel was in imminent hazard of being condemned in the courts of a belligerent by whom she was captured, it is a peril sufficient to entitle to salvage.[10] A vessel in point of fact for several hours in a condition where her instant destruction was menaced, and the lives on board greatly jeoparded, is in a condition to have salvage serv-

ice.[11] A vessel dismasted in a gale and lying at anchor on a bank in an open sea is in a condition to have salvage service rendered.[12] An abandoned vessel found floating in the sea is in the utmost peril, but this is not the case of a wreck in a harbor where vessels are constantly passing, and succor is always at hand.[13] Where a vessel met with a disaster, and the crew abandoned her and went on board another vessel, taking with them a box of bullion, and afterwards transferred themselves and the box of bullion to a vessel bound for their home, the box of bullion was not in peril.[14] So where a ship was run upon a reef and abandoned,[15] or a steam ferry-boat or a barge adrift on the Ohio River, and in peril, is a proper subject for salvage service.[16] A written instrument of abandonment is admissible in evidence to show the perilous situation of the vessel.[17]

1 The Cheeseman v. Two Ferry Boats, 2 Bond, 377; The Independence, 2 Curt. 352; The Charlotte, 3 W. Rob. 68; The Princess Alice, 3 W. Rob. 138; The Versailles, 1 Curt. 353; The Reward, 1 W. Rob. 174.

2 Talbot v. Seeman, 1 Cranch, 1; Murray v. The Charming Betsey, 2 Cranch, 64; The Cornelius Grinnell, 16 Law Rep. N. S. 677; The Saragossa, 1 Ben. 551; Holmes v. The Joseph C. Griggs, 1 Ben. 81. And see Spencer v. The Charles Avery, 1 Bond, 121.

3 The Saragossa, 1 Ben. 551; The Cornelius Grinnell, 16 Law Rep. N. S. 677.

4 The Joseph C. Griggs, 1 Ben. 83; The New Holland, Vl. Ad. at Gibraltar; The Raikes, 1 Hagg. Adm. 247; The Henry Ewbank, 1 Sum. 400.

5 The H. B. Foster, Abb. Adm. 230; The Emulous, 1 Sum. 207.

6 The Pontiac, Newb. 135; S. C. 5 McLean, 365; Talbot v. Seeman, 1 Cranch, 1; The Delphos, Newb. 419.

7 The Georgiana, 1 Low. 91.

8 Coffin v. The John Shaw, 1 Cliff. 230.

9 Holmes v. The Joseph C. Griggs, 1 Ben. 81.

10 Talbot v. Seeman, 1 Cranch, 1; Murray v. The Charming Betsey, 2 Ibid. 64.

11 The John Gilpin, Olcott, 77.

12 The Independence, 2 Curt. 350; S. C. 3 Liv. Law Mag. 499; 8 Law Rep. N. S. 151.

13 The Ida L. Howard, 1 Low. 3; The Lovett Peacock, 1 Low. 143.

14 A Box of Bullion, 1 Sprague, 58; S. C. 6 Law Rep. 368; 1 West. L. J. 355; Waite v. The Antelope, Bee, 233.

15 The Independence, 2 Curt. 351; The Versailles, 1 Curt. 358.

16 The Cheeseman v. Two Ferry Boats, 2 Bond, 383; Seven Coal Barges, 2 Biss. 297.

17 Blagg v. The B. M. Bicknell, 1 Bond, 270.

§ 315. Success of effort a requisite.—An indispensable ingredient of a salvage claim is, that the service has contributed immediately to the rescue or preservation of the property in peril.[1] Unless the property is saved in fact by the salvors, compensation will not be allowed.[2] If the property is not benefited by the exertions of the salvors, they can claim no compensation as salvors;[3] they have no remedy *in rem*.[4] Intentions and exertions are not alone sufficient.[5] It cannot be allowed upon attempts at rescue which have been unsuccessful, though highly meritorious.[6] But if an effort be made in good faith, with means believed to be adequate, the salvor may recover something in the nature of a *quantum meruit*, although his efforts are unsuccessful.[7] It must appear reasonably probable that the labor and skill of the salvor contributed to the protection of the property.[8] The claimant must have had actual possession continuously of the property in peril, with power to save it, and must show the actual employment of means to that end.[9] No salvage for saving life is awarded where no property is saved.[10]

1 The John Wirts, Olcott, 462; The Whitaker, 1 Sprague, 282; S. C. 8 Law Rep. N. S. 497; Montgomery *v.* The T. P. Leathers, Newb. 421; Emerson *v.* The Pandora, Ibid. 438; The Blackwall, 10 Wall. 1; The Albion Lincoln, 1 Low. 76; The Santipore, 1 Spinks Ad. & E. 231; The Genessee, 12 Jur. 401; The Atlas, 1 Lush. 518; The E. U. 1 Spinks Ad. & E. 63; Spencer *v.* The Charles Avery, 1 Bond, 119.

2 Clarke *v.* The Dodge Healy, 4 Wash. C. C. 651; Montgomery *v.* The T. P. Leathers, Newb. 423.

3 The Sailor's Bride, 1 Brown Adm. 69; Jackson *v.* The Magnolia, 20 How. 296; Allen *v.* Newberry, 21 How. 244; McGuire *v.* Card, 21 How.

4 The Williams, 1 Brown Adm. 216; The Camanche, 8 Wall. 448; The Henry Ewbank, 1 Sum. 400; Montgomery *v.* The T. P. Leathers, Newb. 421; Clarke *v.* The Dodge Healy, 4 Wash. C. C. 651.

5 Clarke *v.* The Dodge Healy, 4 Wash. C. C. 651; The India, 1 W. Rob. 406; The Mary, Ibid. 457; The Ranger, 9 Jur. 119; The Lockwoods, 9 Jur. 1017; The Narragansett, Olcott, 392; Talbot *v.* Seeman, 1 Cranch, 1.

6 Brooks *v.* The William Penn, 1 Amer. Law Reg. 584.

7 The Sailor's Bride, 1 Brown Adm. 69; Allen *v.* Newberry, 21 How. 244; McGuire *v.* Card, Ibid. 248; Jackson *v.* The Magnolia, 20 How. 296.

8 The John Wirts, Olcott, 462: The Whitaker, 1 Sprague, 282; S. C. 8 Law Rep. N. S. 497; Montgomery *v.* The T. P. Leathers, Newb. 421; Emerson *v.* The Pandora, Ibid. 438.

9 Clarke *v.* The Dodge Healy, 4 Wash. C. C. 651.

10 Cargo of the Sarpedon, Law Rep. 3 P. D. 28; S. C. 18 Alb. L. J. 37.

§ 316. Salvage in case of recapture.—Salvage is demandable for vessels or cargoes saved from pirates or the public enemy.[1] It is awarded in lieu of prize-money.[2] To support the claim, the taking must be lawful, and there must be a meritorious service rendered.[3] No claim arises

on a recapture by a neutral power, as the act is in itself unlawful.[4] Salvage is not due for the rescue of a neutral vessel or property out of the hands of a belligerent,[5] who took possession from a supposed breach of treaty, or the law of nations,[6] but for the recapture of a neutral armed vessel in possession of the enemy salvage will be allowed.[7] So it may be allowed for the recapture of a ransomed vessel.[8] To entitle to salvage, as upon recapture or rescue, the property must have been in the possession, either actual or constructive, of the enemy.[9] A rescue from the attack of an enemy, by approaching with a superior force, is within the rule;[10] but military salvage will not be allowed, merely on stopping a ship from going into an enemy's port.[11] If a belligerent is compelled to abandon a prize, and a neutral takes possession, the neutral is entitled to salvage;[12] but if the belligerent voluntarily permits the neutral she must be restored after payment of salvage.[13] Where an American vessel, condemned by an unauthorized foreign tribunal, was brought into an American port, and ordered to be restored, no salvage was allowed.[14] The statutes of the United States make no distinction between the recapture by a public armed vessel of the United States and recapture by a private vessel.[15] In case of the recapture of a public vessel by another public vessel, the salvage, costs, and expenses are payable from the treasury, the rule being different from the English rule.[16] Under the Salvage Act of March 3rd, 1800, as well as by the general maritime law, the rule of reciprocity is to be applied to the recapture of the property of friends.[17]

1 Bas *v.* Tingy, 4 Dall. 42; Talbot *v.* Seeman, 1 Cranch; The Progress, Edw. Adm. 210; Brevoor *v.* The Fair American, Bee, 87; Davison *v.* Seal-Skins, 2 Paine, 324.

2 The Deer, 1 Low. 96; The Dos Hermanos, 10 Wheat. 306; The Haase, 1 C. Rob. 286; The Helen, 3 C. Rob. 224; The Hope, Hay. & M. 216; The Progress, Edw. Adm. 210.

3 Talbot *v.* Seeman, 1 Cranch, 1; Davison *v.* Seal-Skins, 2 Paine, 324.

4 Talbot *v.* Seeman, 1 Cranch, 1; Davison *v.* Seal-Skins, 2 Paine, 324.

5 U. S. *v.* Wilder, 3 Sum. 315; The Alexander, 2 Dods. 37; The War Onsken, 2 C. Rob. 299; Talbot *v.* Seeman, 1 Cranch 1; Clayton *v.* The Harmony, Bee, 78; The Eleanora Catharine, 4 C. Rob. 156; 1 C. Rob. 228.

6 Waite *v.* The Antelope, Bee, 235; The Three Friends, 4 C. Rob. 268; The War Onsken, 2 Ibid. 299.

7 Murray *v.* The Charming Betsey, 2 Cranch, 121; Talbot *v.* Seeman, 1 Cranch, 1.

8 Moodil *v.* The Harriet, Bee, 128. And see The Henry, Edw. Adm. 192; The Sir Peter, 2 Dods. 73.

9 The Edward and Mary, 3 C. Rob. 305; The Franklin, 4 C. Rob. 147; The Packet de Bilboa, 2 C. Rob. 133; The Ann Green, 1 Gall. 274, limiting The War Onsken, 2 C. Rob. 299.

10 The Ann Green, 1 Gall. 274.

11 The Ann Green, 1 Gall. 274; The Packet de Bilboa, 2 C. Rob. 133; The Franklin, 4 C. Rob. 147.

12 McDonough v. Dannery, 3 Dall. 188.

13 Booth v. L'Esperanza, Bee, 93: McDonough v. Dannery, 3 Dall. 188; The Adventure, 8 Cranch, 221; The Sir Peter, 2 Dods. 73; The London, Ibid. 74.

14 Coulon v. The Neptune, 2 Pet. Adm. 356; The Flad Oyen, 1 C. Rob. 135.

15 The Leviathan, 12 Opin. Atty. Gen. 289. And see Rev. Stats. secs. 4652, 4759.

16 The Leviathan, 12 Opin. Atty. Gen. 289.

17 The Adeline, 9 Cranch, 244; The Star, 3 Wheat. 78.

§ 317. Compensation, general principles.—Compensation is awarded, not upon the idea of a *quantum meruit*, but by way of rewarding the service in proportion to the degree of merit in each particular case.[1] The reward should be not only an ample remuneration for the risk of life and property, and for labor, privations, and hardships encountered, but so liberal as to furnish an incentive to similar exertions by others,[2] upon the enlarged principles and policy of maritime jurisdiction in salvage causes.[3] The amount varies with the hazard, trouble, expense incurred in each particular case,[4] the fatigue, anxiety, determination to encounter dangers, the spirit of adventure, skill and dexterity,[5] and actual danger.[6] The amount of salvage awarded must necessarily rest in a sound discretion, to be exercised according to the circumstances of each case,[7] and the decree may be for more than is demanded.[8] It is increased as an incentive and premium,[9] to encourage others to save property in distress.[10] Courts may rightfully regulate the award at their discretion, but fixed rules are more useful and satisfactory in their operation than mere discretionary allowances.[11] Salvage service is favored and rewarded liberally,[12] looking to the merit and effort and peril of the service, and the duty of encouraging assistance in cases of distress.[13] The circuit court is not in the habit of reversing decrees as to the amount of salvage, unless upon some clear and palpable mistake or gross over-allowance of the lower court.[14] Marine assistance by steam vessel must be encouraged by a liberal compensation.[15] Courts will allow a liberal compensation in proportion to the benefit received by the owners,[16] which is the leading and dominant consideration;[17] the benefit conferred, as well as to the time,

trouble, danger, etc.;[18] the nature and character of the service, peril involved, and expense, as well as the situation and condition of the vessel saved, and its value,[19] the risk of the property, and especially of the persons, of the salvors, severity and duration of their labors, promptness of their interposition, and their skill,[20] having a just regard to the circumstances of each case, to the risk and labor, treatment of the property saved, and the value of that put at hazard by the salvage service.[21] Gallantry and exposure in the rescue of life and property are entitled to the highest reward.[22] Compensation is allowed for meritorious services, although the case was not one of salvage;[23] so a salvor may be entitled to compensation, although his conduct has been such as to forfeit a salvage remuneration.[24] Expenses of volunteers have been paid, where unexpectedly aid becomes necessary or the attempt abortive.[25] Expenses and a reasonable compensation decreed, although not a salvage service.[26]

1 The John E. Clayton, 4 Blatchf. 372; Hand v. The Elvira, Gilp. 60; The William Beckford, 3 C. Rob. 286.

2 Warder v. La Belle Creole, 1 Pet. Adm. 31; Bond v. The Cora, 2 Wash. C. C. 80; Bearse v. Pigs of Copper, 1 Story, 314; The Emulous, 8 Cranch, 110; Coulon v. The Neptune, 2 Pet. Adm. 356; Union Towboat Co. v. The Delphos, Newb. 412; McGinnis v. The Pontiac, 5 McLean, 388; Hand v. The Elvira, Gilp. 60; The Henry Ewbank, 1 Sum. 400.

3 The Narragansett, Olcott, 390; The Industry, 3 Hagg. Adm. 202; Bearse v. Pigs of Copper, 1 Story, 314.

4 Weeks v. The Catharina Maria, 2 Pet. Adm. 424; Barrels of Oil, 1 Sprague, 91; S. C. 7 Law Rep. 377; The Narragansett, 1 Blatchf. 211; Taylor v. The Friendship, Bee, 175.

5 Hand v. The Elvira, Gilp. 69; The William C. Beckford, 3 C. Rob. 286; Barden v. The William Penn, 2 Hughes, 145.

6 The M. B. Stetson, 1 Low. 122; The Princess Alice, 3 W. Rob. 138; The Georgiana, 1 Low. 93; Post v. Jones, 19 How. 150; The Devernon, 1 W. Rob. 180.

7 The Charles, Newb. 337; Hand v. The Elvira, Gilp. 60; Talbot v. Seeman, 1 Cranch, 1; The Rising Sun, 1 Ware, 384; The Aquila, 1 C. Rob. 32; The Centurion, 1 Ware, 477; The Fortune, 2 W. Rob. 92; Rowe v. The Brig ——, 1 Mason, 372; The Henry Ewbank, 1 Sum. 400; Cross v. The Bellona, Bee, 194; McGinnis v. The Pontiac, 5 McLean, 367; The Britain, 1 W. Rob. 50; Clayton v. The Harmony, 1 Pet. Adm. 79.

8 Pratt v. Thomas, 1 Ware, 432; The Jonge Bastiaan, 5 C. Rob. 287.

9 Brevoor v. The Fair American, 1 Pet. Adm. 90; Taylor v. The Cato, 1 Pet. Adm. 48.

10 Mason v. The Blaireau, 2 Cranch, 240; The Sarah, 1 C. Rob. 313, note; The Hector, 3 Hagg. Adm. 90; Bell v. The Anne, 2 Pet. Adm. 282.

11 The John Wirts, Olcott, 472; Tyson v. Prior, 1 Gall. 133; Roff v. Nass, 19 Int. Rev. Rec. 94.

12 The Aroma Mills, 2 Hughes, 41; The Centurion, 1 Ware, 477; The Emblem, 2 Ware, (Dav.) 61; The Blackwall, 10 Wall. 14; Cromwell v. The Island City, 1 Cliff. 221.

13 The Emulous, 1 Sum. 221; The Sarah, 1 C. Rob. 313; The William Beckford, 3 C. Rob. 286; Rowe *v.* The Brig ——, 1 Mason, 372.

14 Brooks *v.* The William Penn, 1 Amer. Law Reg. 584; The Raikes, 1 Hagg. Adm. 246; The H. B. Foster, Abb. Adm. 234.

15 The Camanche, 8 Wall. 479; The Delaware, 6 Blatchf. 527; The True Blue, 4 Moore P. C. C. 96; The Emulous, 1 Sum. 207; Baker *v.* Hemenway, 2 Low. 501.

16 Eads *v.* The H. D. Bacon, Newb. 274.

17 Taylor *v.* The Cato, 1 Pet. Adm. 60.

18 The M. B. Stetson, 1 Low. 119.

19 The John E. Clayton, 4 Blatchf. 372; Taylor *v.* The Friendship, Bee, 175.

20 The Cheeseman *v.* Two Ferry Boats, 2 Bond, 378; The Versailles, 1 Curt. 353.

21 The Rising Sun, 1 Ware, 384; The Henry Ewbank, 1 Sum. 400; Bond *v.* The Cora, 2 Wash. C. C. 90; The Emulous, 1 Sum. 207; The Elizabeth and Jane, 1 Ware, 35.

22 The H. B. Foster, Abb. Adm. 232; The Clifton, 3 Hagg. Adm. 117; The Anna, 6 Ben. 169; The St. Jean Baptiste, 2 Giroud & C. 375; Post *v.* Jones, 19 How. 161; The Florence, 20 Eng. L. & E. 607.

23 The Sailor's Bride, 1 Brown Adm. 68; The Clarion, Ibid. 74; The William, Ibid. 208.

24 American Ins. Co. *v.* Johnson, Blatchf. & H. 10.

25 The Ranger, 9 Jur. 119; The Albion, 3 Hagg. Adm. 254.

26 The Happy Return, 2 Hagg. Adm. 198; The Traveller, 3 Hagg. Adm. 370; The James Watt, 2 W. Rob. 270; The Purissima Concepcion, 3 W. Rob. 181; The Favourite, 2 C. Rob. 232; The Louisa Jane, 2 Low. 304.

§ 318. Ingredients of salvage services.—The ingredients of a salvage service are: first, enterprise in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow-creatures, and to rescue their property; second, the degree of danger and distress from which the property is released, as when in imminent peril; third, the degree of labor and skill of salvors; and fourth, the value of the property saved.[1] The value of the property saved constitutes a material ingredient;[2] the value at the time and place of saving.[3] Risk of life is not a necessary ingredient, but it places the salvors in a higher position of merit, and entitles them to a more liberal compensation.[4] Risk, enterprise, and disinterestedness are necessary characteristics of every salvage service.[5] The inducement to save life and property should likewise be held forth, to a fair and upright conduct with regard to the objects preserved.[6] The preservation of life, if it can be connected with the preservation of property, whether by accident or not, must be considered.[7] Most intimately, if not necessarily, connected with the manner and merit of the salvage of the vessel, must be that also of the salvage of the cargo.[8]

Where none of the requisites occur, the service deserves little better than a mere remuneration for work and labor.[9] If property be left, though not derelict, one who, in good faith, takes possession as salvor, has his reasonable claim for salvage, according to the good he actually does.[10]

1 The Delphos, Newb. 419; The Clifton, 3 Hagg. Adm. 117; The Narragansett, Olcott, 390.

2 The Henry Ewbank, 1 Sum. 412; The Waterloo, 2 Dods. 433; The Blenden Hall, 1 Dods. 414; Bowley *v.* Goddard, 1 Low. 154; The Amerique, Law Rep. 6 P. C. 468; Baker *v.* Hemenway, 2 Low. 503.

3 The Albion Lincoln, 1 Low. 74; The George Dean, Swabey, 290.

4 Spencer *v.* The Charles Avery, 1 Bond, 119; The William Beckford, 3 C. Rob. 286; The Emulous, 1 Sum. 214.

5 The Merrimac, 1 Ben. 207; The Clifton, 3 Hagg. Adm. 117; The Enterprise, Ship. Gaz. 1854; The Black, Ship. Gaz. 1854; The Purissima Concepcion, 3 W. Rob. 181.

6 Cromwell *v.* The Island City, 1 Cliff. 229; Mason *v.* The Blaireau, 2 Cr. 240.

7 The Emblem, 2 Ware, (Dav.) 64; The Aid, 1 Hagg. Adm. 83; The Two Catherines, 2 Mason, 319; The Mulhouse, Law Rep. N. S. 276; Spencer *v.* The Charles Avery, 1 Bond, 119; The George Nicholas, Newb. 452; The Boston, 1 Sum. 328.

8 Shawls, Abb. Adm. 325; The Emma, 2 W. Rob. 315.

9 Robson *v.* The Huntress, 2 Wall. Jr. 68; The Clifton, 3 Hagg. Adm. 117.

10 The Senator, 1 Brown Adm. 375; Talbot *v.* Seeman, 1 Cranch, 1.

§ 319. Measure of reward.—Oversight and responsibility should receive an enhanced compensation.[1] Taking in charge a wreck, rendering labor, incurring risk and deviation, to supply the wreck with a crew, should be considered.[2] The court takes into consideration the merits and motives of the salvor,[3] giving a liberal reward for the fidelity and vigilance of the salvors, and reprobating and diminishing the compensation for every negligence.[4] Services attended with little danger or expense, and of short duration, are not entitled to be placed in the highest order of salvage.[5] It ought not to be diminished by a favorable state of the weather after arrival, nor increased by an unfavorable state of the weather.[6] Proposing the privilege of stripping a vessel in case they are not successful, in advance of their making any effort to save her, detracts materially from the merit of their claim,[7] but salvors are not to be driven out of court upon the suggestion that if they had not touched the vessel derelict she might have been saved in some possible way.[8] Where a vessel was abandoned in near proximity to the entrance of a great seaport, and in the track of vessels inward and outward bound, with no one on board to set her lights, keep her on her course, or to answer or give hails, the

reward should be such as to insure the rendering of any service, incurring of any risk, and deviation by any vessel to supply the wreck with a crew and make her presence safe.[9] A liberal reward is granted in cases of derelict, as it is not for the owner to complain of the reward paid to strangers who restore the property, and as protection of the public from danger demands it.[10] The true principle is an adequate reward, according to the circumstances of the case.[11]

1 The Ida L. Howard, 1 Low. 3.

2 The Anna, 6 Ben. 166.

3 American Ins. Co. v. Johnson, Blatch. & H. 29; The Vrow Margaretha, 4 C. Rob. 103; Mason v. The Blaireau, 2 Cranch, 240.

4 The Boston, 1 Sum. 339; Mason v. The Blaireau, 2 Cranch, 240; Spurr v. Pearson, 1 Mason, 104.

5 The John Gilpin, Olcott, 88; Coffin v. The John Shaw, 1 Cliff. 230; The Westminster, 1 W. Rob. 229; The Clifton, 3 Hagg. Adm. 117.

6 The Saragossa, 1 Ben. 557; The Cornelius Grinnell, 11 Law Tl. N. S. 273.

7 Coffin v. The John Shaw, 1 Cliff. 230.

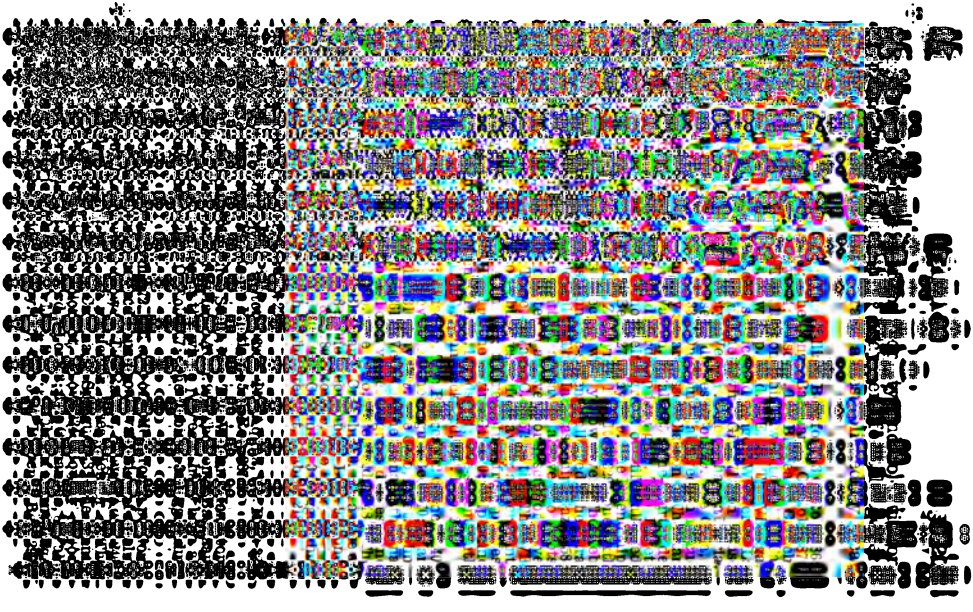
8 The Charles, Newb. 336; The Henry Ewbank, 1 Sum. 400. And see Holmes v. The Joseph C. Griggs, 1 Ben. 81.

9 The Anna, 6 Ben. 166.

10 The Anna, 6 Ben. 166.

11 The Cayenne, 2 Abb. U. S. 47; Post v. Jones, 19 How. 159.

§ 320. Rate of allowance.—In general, the rate of salvage ought not to be less than one-third, unless the property be very valuable, or the service very inconsiderable.[1] It is rarely less than one-third or more than one-half of the property saved.[2] Where salvors are very meritorious, and the value of the vessel and articles saved is very small, the court will exceed in its allowance the proportion usually given.[3] A moiety has rarely been given except in cases of derelict.[4] Where the property is small, the salvors numerous, and the perils imminent, or the services laborious and exhausting, a larger allowance than a moiety is justified.[5] Where a vessel was found waterlogged, and apparently, though not in fact, derelict, was towed to a place of safety, the whole time occupied being six hours, one and one-half per cent. on the value of vessel and cargo was deemed a proper compensation.[6] In awarding salvage for the preservation of the property of foreigners, courts have regard to the rates of allowance which obtain in the courts of the owner's country, it being the policy to observe a rule of reciprocity.[7] A low rate of salvage should be allowed where salvors in good weather simply towed a vessel disabled to a safe anchor-



The Rebecca Clyde, 5 Ben. 98; Adams v. The Island City, 1 Cliff. 210; Norris v. The Island City, Ibid. 219; Cromwell v. The Island City, Ibid. 221; The John G. Paint, 2 Ben. 174; Sturtevant v. The George Nicholaus, Newb. 449; The Georgiana, 1 Low. 91; The Perth, 3 Hagg. Adm. 414; The Roe, Swabey, 84; The Janet Mitchell, Swabey, 111; The Golondrina, Law Rep. 1 Adm. & Ec. 334; The Jouge Bostiaan, 5 C. Rob. 287; The Albion Lincoln, 1 Low. 71.

7 The Waterloo, Blatchf. & H. 127; Armroyd v. Williams, 2 Wash. C. C. 508; Mason v. The Blaireau, 2 Cranch, 240.

8 The Bolivar v. The Chalmette, 1 Woods, 397.

§ 321. Rate in cases of derelict.—Anciently, it was a positive rule, in cases of derelict property, to allow one-half to the salvors,[1] but the rule bends to the reason and equity of particular cases,[2] and though somewhat relaxed, the rule still continues to be favored;[3] the rule of compensation is deemed flexible, yet a moiety is generally awarded;[4] the growing preference is on a moiety, in cases of absolute derelict,[5] unless special circumstances call for a discriminating valuation.[6] As a general rule, the rate of salvage of a vessel derelict at sea is a moiety of her value.[7] It is with great reluctance that more than a moiety is awarded;[8] and, except in special cases in which great hardships and dangers have been encountered, this is the extreme limit.[9] Cases might occur of such extreme peril and difficulty, of such exalted nature and enterprise, that a moiety even of a very valuable property might be too small; and, on the other hand, where attended with so little difficulty and peril, that it would entitle the parties to little more than a mere *quantum meruit* for work and labor done.[10] The whole net proceeds may be awarded under special circumstances,[11] as where the property was of little value, and the owners abandoned it.[12] The true rule in cases of derelict is: divide the proceeds which remain over all costs and disbursements of the salvage suit equally between the salvors and the owners of the rescued property, giving to each of these two interests a moiety.[13]

1 The Charles Henry, 1 Ben. 8; Lewis v. The Elizabeth and Jane, 1 Ware, 39; The Aquila, 1 C. Rob. 32.

2 The Elizabeth and Jane, 1 Ware, 39; Rowe v. The Brig ———, 1 Mason, 372.

3 The Henry Ewbank, 1 Sum. 410; Rowe v. The Brig ———, 1 Mason, 372; The Fortuna, 4 C. Rob. 278; L'Esperance, 1 Dods. 46; The Blenden Hall, Ibid. 414; The Elliotta, 2 Dods. 75.

4 The Mary Ford, 3 Dall. 188; The Adventure, 8 Cranch, 226; The Elliotta, 2 Dods. 75; Cross v. The Bellona, Bee, 193; Flinn v. The Lander, Bee, 260; Bell v. The Ann, 2 Pet. Adm. 279. Either a moiety or two-fifths—The Aquila, 1 Rob. 32; The Jonge Bastiaan, 5 C. Rob. 287; The Lord Nelson, Edw. Adm. 79; The Maria, 1 Edw. Adm. 175.

5 The Henry Ewbank, 1 Sum. 400; The John Wurts, Olcott, 473; Bond v. The Cora, 2 Wash. C. C. 80.

her being considered derelict;[3] as, where the master, officers, and crew left the vessel in extreme anxiety for their personal safety, or when the condition of the vessel was such that her instant destruction was menaced.[9] Where the master and crew leave their vessel and take to the long boat and are picked up by another vessel, while yet in sight of the wreck, the vessel and cargo are derelict.[10] A vessel with slaves on board, but without any white person, is derelict.[11] Where the master, officers, and part of the crew of a vessel injured by a collision remained in small boats about the wreck, and after a brief interval returned on board, she was not derelict.[12] Where a steamboat on the Mississippi, being on fire, was surrendered to the master and crew of a sailing vessel, under the conviction that nothing could be effectually done for her safety without the aid of the sailing vessel, it was not a case of derelict.[13] A vessel is not derelict when temporarily left by her tug, which afterwards returned to her assistance.[14] It is not derelict to leave a barge with no one on board, when it is at anchor, where it was a common usage to leave them so.[15] A thing cast overboard in a storm to lighten the vessel is not derelict.[16] Vessels found derelict are national droits, if no owner appears.[17]

1 Rowe *v.* The Brig ——, 1 Mason, 372; Tyson *v.* Prior, 1 Gall. 133; The Jenny Lind, Newb. 440; Montgomery *v.* The T. P. Leathers, Newb. 421; The Ida L. Howard, 1 Low. 7; The John Gilpin, Olcott, 77; The Sarah Bell, 4 No. of Cas. 147. And see Taylor *v.* The Cato, 1 Pet. Adm. 50, distinguishing The Aquila, 1 C. Rob. 32.

2 Tyson *v.* Prior, 1 Gall. 133; Rowe *v.* The Brig ——, 1 Mason, 372; The Island City, 1 Black, 121.

3 The Bee, 1 Ware, 332; The Elizabeth and Jane, 1 Ware, 35; Tyson *v.* Prior, 1 Gall. 133; The Boston, 1 Sum. 328; The Emulous, 1 Sum. 210; The Henry Ewbank, 1 Sum. 400; Cromwell *v.* The Island City, 1 Cliff. 224; The H. B. Foster, Abb. Adm. 222; Rowe *v.* The Brig ——, 1 Mason, 372; The Attacapas, 3 Ware, 65; Montgomery *v.* The T. P. Leathers, Newb. 426; The Aquila, 1 C. Rob. 32; Carroll *v.* The T. P. Leathers, Newb. 433; Flinn *v.* The Leander, Bee, 260; L'Esperance, 1 Dods. 46.

4 Cromwell *v.* The Island City, 1 Cliff. 224; The Boston, 1 Sum. 328; The Beaver, 3 C. Rob. 92; The Barefoot, 1 Eng. L. & E. 661; The Emulous, 1 Sum. 210.

5 Mesner *v.* Suffolk Bank, 1 Law Rep. 249.

6 Rowe *v.* The Brig ——, 1 Mason, 372; The Lord Nelson, Edw. Adm. 79; The Blenden Hall, 1 Dods. 414, denying the Jonge Johanna, 4 C. Rob. 263.

7 Bond *v.* The Cora, 2 Pet. Adm. 376; Mason *v.* The Blaireau, 2 Cranch, 240. See Evans *v.* The Charles, Newb. 329.

8 The Laura, 14 Wall. 336.

9 The Laura, 14 Wall. 336; The Georgiana L'Esperance, 1 Dods. 46; The Coromandel, Swabey, 205; The Sarah Bell, 4 No. of Cas. 144; Rowe

v. The Brig ——, 1 Mason, 372; The Boston, 1 Sum. 328; The John Gilpin, Olcott, 77. And see The Attempan, 3 Ware, 66; The Emulous, 1 Sum. 207; Misner v. Suffolk Bank, 1 Law Rep. 249.

10 The Boston, 1 Sum. 328.

11 Flinn v. The Leander, Bee, 260.

12 Misner v. The Suffolk Bank, 1 Law Rep. 249.

13 Montgomery v. The T. P. Leathers, Newb. 421; Emerson v. The Pandora, Ibid. 488.

14 Cromwell v. The Island City, 1 Cliff. 221; Bryan v. U. S. 6 Ct. of Cl. 126.

15 Tome v. Four Cribs of Lumber, Taney, 545; The Upnor, 2 Hagg. Adm. 3.

16 Montgomery v. The T. P. Leathers, Newb. 426; Rowe v. The Brig ——, 1 Mason, 372.

17 Taylor v. The Cato, 1 Pet. Adm. 68; The Aquila, 1 C. Rob. 32.

§ 323. **Who to share in award.**—A master of a vessel is authorized in going to the rescue of a wrecked vessel, and all who are ready and willing to engage in the service are entitled to share in the reward;[1] all who materially contribute to the saving are entitled to share;[2] all who give personal service; and the cargo, freight, etc., saved constitute one fund or subject of salvage.[3] The reward for enterprise, personal skill, risk, etc., can be awarded only to the individuals by whom the service is performed.[4] A passenger who assisted in saving the property is entitled to a portion of the salvage.[5] Passengers who are bold to undertake a salvage service upon a derelict, and active to assist, are entitled to an increased share; but those who refuse to assist when solicited are not entitled to share in the award.[6] If apprentices are sailors they are entitled to their share,[7] and the master cannot claim their shares.[8] The shipper of the cargo is not entitled to salvage earned in the voyage, unless the stoppage and deviation were authorized by him.[9] Where the master and owners of a tug presented their bill in the name of the tug and her owner for salvage, it must be construed as covering the services of the crew, who, together with the vessel and its machinery, constituted the efficient agency that performed the salvage service,[10] and the receipt of the salvage by them renders them accountable to the crew for their share of the same.[11] When the benefit received will warrant it, the salvor will be entitled to share to a greater or less degree in the benefit.[12] Equal shares will be given to the master and pilot of a sailing vessel.[13] When two vessels come up together to render assistance, all persons composing the crews are entitled to share.[14] Simply lying by or consorting with another ship, if by contract, will sustain the claim.[15] In the case of several salvors, all are

entitled to share in the reward;[16] the division should be in proportion to the merits of each;[17] the share depending largely on the nature of the effort.[18] And when the benefit received will warrant it.[19] The distribution made by award of parties appointed by the court is conclusive.[20] Cases may arise in which officers and crews of naval vessels may be entitled to salvage; but something more than the usual peril should be encountered, and for extraordinary exertions,[21] when they will be entitled to salvage, but to a less amount than to private persons.[22] But where delay caused was slight, and no unusual hardship or peril encountered, they are not entitled to salvage.[23]

1 The Centurion, 1 Ware, 477; The Baltimore, 2 Dods. 132.

2 The Blackwall, 10 Wall. 1.

3 The Ottawa, 1 Low. 274.

4 Union Towboat Co. v. The Delphos, Newb. 412.

5 Bond v. The Cora, 2 Wash. C. C. 80; S. C. 2 Pet. Adm. 361.

6 The Charles Henry, 1 Ben. 8; The Baltimore, 2 Dods. 132.

7 Mason v. The Blaireau, 2 Cranch, 240.

8 Waterbury v. Myrick, Blatchf. & H. 43.

9 The Nathaniel Hooper, 3 Sum. 581; 2 Law Rep. 165; Bond v. The Cora, 2 Wash. C. C. 80; 2 Pet. Adm. 361; Taylor v. The Cato, 1 Pet. Adm. 48.

10 Roff v. Wass, 2 Sawy. 538.

11 Roff v. Wass, 2 Sawy. 538; Studley v. Baker, 2 Low. 205.

12 The W. F. Garrison, 1 Low. 139.

13 Brooks v. The William Penn, 2 Hughes, 145.

14 The Mountaineer, 2 W. Rob. 7.

15 The Williams, 1 Brown Adm. 226; The Underwriter, 4 Blatchf. 94.

16 The Blackwall, 10 Wall. 12; The Pride of Canada, Blatchf. & H. 208; The Bentley, Swabey, 198; Norris v. The Island City, 1 Cliff. 219.

17 The Henry Ewbank, 1 Sum. 421; The Jonge Bastiaan, 5 C. Rob. 287.

18 The Albion Lincoln, 1 Low. 76; The Santipore, 1 Spinks Ec. & Ad. 231.

19 The Genessee, 12 Jur. 401; The Atlas, 1 Lush. 518; The E. U. 1 Spinks Ec. & Ad. 63.

20 The Henry Ewbank, 1 Sum. 428; McDonough v. Dannery, 3 Dall. 188.

21 The Josephine, 2 Blatchf. 328; The Gage, 6 C. Rob. 273; The Lord Nelson, Edw. Adm. 79; The Pensamento Feliz, Edw. Adm. 115; U. S. v. The Amistad, 15 Peters, 518; The Thetis, 3 Hagg. Adm. 14; The Helene, Ibid. 430; The Lustre, Ibid. 154; Le Tigre, 3 Wash. C. C. 567; The Mary Ann, 1 Hagg. Adm. 158; The Wave, Blatchf. & H. 243. Distribution to vessels in the navy, see Rev. Stats. secs. 4642, 4652.

22 The Mulhouse, 12 Law Rep. N. S. 276.

23 The Josephine, 2 Blatchf. 328.

§ 324. Owners entitled to share.—The owners of the vessel whose crew perform salvage services share the salvage compensation,[1] although not present when the service was performed,[2] solely on the ground of the risk and damage to which their property is or may be subjected,[3] of ships or vessels whether propelled by steam or otherwise,[4] and whether they be individuals or corporations;[5] so as to owner of wrecking vessels.[6] Under ordinary circumstances they are allowed one-third of the amount awarded as salvage compensation; but where the service was of a character to expose the vessel to peculiar danger, especially in case of a large steamer, and of great value, more may be allowed.[7] Owners can come in as co-salvors only where their vessel has been the direct means of rendering the service for which salvage is awarded.[8] The amount allowed must be in proportion to the risk incurred.[9] The mere fact that the vessel sails under a charter party does not divest the absolute owner of his right to salvage, or entitle the charterer to salvage, unless he thereby becomes owner for the voyage.[10] Where expenses are incurred, the proportion belonging to the ship is to be included with the repairs in making the estimate of fifty per cent.[11] The general owners are entitled to remuneration in addition to expenses, when they show actual loss suffered, or risk to their property; but charterers are not in the same position except under a stipulation giving them the control and benefit of the salvage, or unless the vessel is sailed on their responsibility.[12] The rule allowing salvage compensation to owners is applicable to corporations owning vessels engaged in salvage services,[13] and they may sustain suits for salvage. They can only be entitled to compensation for the use of their property.[14] A partial and contingent interest in the property will not disqualify the owners, as a corporation, from performing a salvage service.[15] The policy of courts of admiralty is to encourage salvage services by large, powerful, well-equipped, and valuable steamers, by giving their owners one-half of the compensation awarded;[16] they look with favor on the exertions of steamers assisting vessels in distress.[17] Steamers are entitled to a greater reward than any other salvors.[18] The master has authority to deviate to go to the rescue of a vessel in distress, and in return it enables the owner to partake liberally of the salvage remuneration.[19] Where the shipmaster pledged funds of the owners to procure another vessel in which the salvage service was effected, the owners could not proceed *in rem* as co-salvors.[20] Where the master in charge of a valuable vessel and cargo abandoned his voyage to bring in a

that the lays can be reckoned.[9] Although a salvage service may be meritorious and valuable, yet the court of admiralty being limited to the remedy by sale of the property saved, salvage is not allowed for rescuing written documents, such as bills of exchange, or evidences of debt, or of title.[10] Nor is it awarded on money found on a drowned passenger,[11] nor on clothing of the master and seamen left on board an abandoned vessel;[12] but for saving the trunks of a passenger containing a quantity of silver coin, salvage was allowed.[13] The owner of the goods saved should pay salvage in proportion to the goods saved, and the advantage he receives; adding a reward as an example and incentive to others, and not according to the property of the salvor.[14]

1 The Cheeseman v. Two Ferry Boats, 2 Bond, 374; The Emulous, 1 Sum. 207.

2 Montgomery v. The T. P. Leathers, Newb. 421.

3 Montgomery v. The T. P. Leathers, Newb. 421; The Albion Lincoln, 1 Low. 76; The Vesta, 2 Hagg. Adm. 189.

4 The Waterloo, Blatchf. & H. 128; Concklin v. The Harmony, 1 Pet. Adm. 34.

5 Stevens v. The Argus, Bee, 170; Peisch v. Ware, 4 Cranch, 347.

6 The Davis, 10 Wall. 18; Brown v. Stapylton, 4 Bing. 119; The Marquis of Huntly, 3 Hagg. Adm. 246; The Lord Nelson, Edw. Adm. 79; U. S. v. Wilder, 3 Sum. 308; The Siren, 7 Wall. 161; Briggs v. Light Boats, 11 Allen, 157.

7 The Siren, 7 Wall. 161; The S. L. Davis, 6 Blatchf. 138; S. C. 2 Bank. Reg. 3.

8 The Dorothy Foster, 6 C. Rob. 88; The Progress, Edw. Adm. 210.

9 Montgomery v. Tyson, 1 Low. 134; Utpadel v. Fears, 1 Sprague, 559; Reed v. Hussey, Blatchf. & H. 525; The Holder Borden, 1 Sprague, 144.

10 The Emblem, 2 Ware, (Dav.) 61.

11 The Amethyst, 2 Ware, (Dav.) 20.

12 The Rising Sun, 1 Ware, 378.

13 The Emblem, 2 Ware, (Dav.) 61.

14 Taylor v. The Cato, 1 Pet. Adm. 65; Warder v. La Belle Creole, Ibid. 31.

§ 326. Forfeiture for misconduct.—The rules of admiralty which deny salvors all compensation when guilty of misconduct or bad faith, apply not only to embezzlement, but to any misconduct—such as false representations, exaggerating the danger or hardship, and to enhance the reward—spoliation, smuggling, an obtrusion of unnecessary service, and a refusal to accept necessary or needful assistance.[1] Compensation presupposes good faith, meritorious service, complete restitution, and incorruptible vigilance, so far as the property is within the

reach and under the control of the salvors.[2] So, gross negligence or wanton injury to the property saved,[3] as a neglect to inform the injured vessel beforehand of imminent and secret danger, when able to give the warning,[4] or the willful omission to comply with a State law regulating the care and custody of wrecks, will defeat the claim to compensation for salvage services.[5] Misconduct as to wrecked property is a failure to deliver to the sheriff, and libel in admiralty for salvage.[6] The law visits any embezzlement, however small, with an entire forfeiture of all claim for salvage,[7] either direct or by connivance with others.[8] Where salvors stripped a vessel having her name and port painted on her stern, and carried the property saved directly past her home port, they were guilty of embezzlement, and forfeited their right to compensation.[9] The fraudulent acts of the master in concealing a portion of the properties saved will not deprive the crew of their right to salvage on all the property saved.[10] A claim for salvage is in the nature of a general lien, and any irregular proceeding on the part of the salvors furnishes reasons to diminish the reward.[11] The court will mark its disapproval of tampering with the log, by condemning the vessel to pay the costs of the action.[12]

1 Harley v. Gawley, 2 Sawy. 7; The Bello Corrunes, 6 Wheat. 152; The Boston, 1 Sum. 341.

2 The Boston, 1 Sum. 328; Cromwell v. The Island City, 1 Cliff. 229.

3 Sumner's Appeal, 1 Brown Adm. 52.

4 American Ins. Co. v. Johnson, Blatchf. & H. 10.

5 Harley v. Gawley, 2 Sawy. 7.

6 Harley v. Gawley, 2 Sawy. 7; Hamilton v. Davis, 5 Burr. 2732; Wilkie v. The St. Petre, Bee, 83.

7 Lewis v. The Elizabeth and Jane, 1 Ware, 43; Mason v. The Blaireau, 2 Cranch, 240; The Rising Sun, 1 Ware, 381; The Boston, 1 Sum. 328; Cromwell v. The Island City, 1 Cliff. 229; S. C. 1 Black, 121; The Barefoot, 1 Eng. L. & E. 661; The Duke of Manchester, 2 W. Rob. 470; The John Perkins, 1 Law Rep. N. S. 87; Harley v. Gawley, 2 Sawy. 7; The L. T. Knights, 1 Low. 397; Flinn v. The Leander, Bee, 262; Brevoor v. The Fair American, 1 Pet. Adm. 99; The Bello Corrunes, 6 Wheat. 152; The Dove, 1 Gall. 585; The Missouri's Cargo, 1 Sprague, 270.

8 The Boston, 1 Sum. 340; Mason v. The Blaireau, 2 Cranch, 240; Spurr v. Pearson, 1 Mason, 104.

9 The Sumner's Apparel, 1 Brown Adm. 52.

10 The Missouri's Cargo, 1 Sprague, 270; Mason v. The Blaireau, 2 Cranch, 240; The Boston, 1 Sum. 328; The Rising Sun, 1 Ware, 378. And see The Florence, 20 Eng. L. & E. 607; The Barefoot, 1 Eng. L. & E. 661.

11 Peisch v. Ware, 4 Cranch, 347.

12 Freight Money of the Anastasia, 1 Ben. 168.

§ 327. Lien for salvage.—A salvor has a qualified property in the articles saved, and he need not remain in the actual possession in order to maintain his rights.[1] The salvors may retain possession of the goods saved until the proper compensation is made for their trouble.[2] So as to salvors of goods cast away.[3] If the salvor surrenders the property to the owner, to the extent of its value he may hold the owner personally for a proper salvage compensation.[4] The lien for salvage takes precedence of prior maritime liens,[5] and against a claim for general average arising from jettison.[6] Where services are rendered in getting a vessel off a reef, in the distribution of the proceeds they are entitled to a priority over a claim for general average from a jettison, although one of the salvors had the promise of a third party to pay him.[7] The finder becomes the legal possessor. and his claim takes precedence of all other titles.[8] So possession taken of an abandoned vessel gives the right to retain it till salvage completed, as against all others.[9] They cannot be divested of their interest until adjudication,[10] and there is no difference in principle before and after property is brought to a place of safety.[11] After a vessel has been brought into port by salvors, her owners have no right to take her to another port without the consent of the salvors.[12] A salvage service in raising and preserving a steamer has a priority of lien over claims for wages earned and supplies furnished before the accident.[13] The agreement to pay salvage creates a valid lien,[14] but prior lien-holders are not concluded as to the amount of compensation agreed on.[15] The fact that a salvor is also a mortgagee of the salved vessel does not deprive him of his preferred claim to salvage.[16] By the State statute concerning wrecks, the title to wrecked property, whether a wreck in the technical sense of the term, or *flotsam*, *jetsam*, or *ligan*, or abandoned in a tempest, with no buoy attached, is not divested out of the true owner, nor will the sinking and abandonment of a vessel divest the owners of title.[17] The rights of salvors are not lost by a temporary leaving;[18] so, if relieved by other salvors, do not lose their rights:[19] the question will always resolve itself into a consideration of circumstances attending each particular case.[20] Whoever first obtains possession of a lost anchor may hold it till his salvage is paid.[21]

1 Eads *v.* The H. D. Bacon, Newb. 274; The John Perkins, 3 Ware, 89; The Bee, 1 Ware, 332; The John Gilpin, Olcott, 77; A Box of Bullion, 1 Sprague, 57; The Missouri's Cargo, 1 Sprague, 260; The Amethyst, 2 Ware, (Dav.) 20; The Maria, Edw. Adm. 175. And see Brevoor *v.* The Fair American, 1 Pet. Adm. 87; Packard *v.* The Louisa, 2 Wood. & M. 48; Hartfort *v.* Jones, 1 Ld. Raym. 393; 2 Salk. 654; Osborne *v.*

Rogers, 1 Sumn. 396; Baring v. Day, 8 East, 57; The Blenden Hall, 1 Dods. 414; The Charlotta, 2 Hagg. Adm. 361; The Eugene, 3 Hagg. Adm. 156; The Effort, Ibid. 165; The Queen Mab, Ibid. 242; The Maria, Edw. Adm. 175; Seaman v. Erie R. R. Co. 2 Ben. 132; The Emblem, 2 Ware, (Dav.) 61.

2 Hartfort v. Jones, 1 Ld. Raym. 393; Baring v. Day, 8 East, 57; The Glasgow Packet, 8 Jur. 675; The Towan, 8 Jur. 222; Clark v. Chamberlain, 2 Mees. & W. 78.

3 Hartfort v. Jones, 1 Ld. Raym. 393; 2 Salk. 656; Clayton v. The Harmony, 1 Pet. Adm. 74.

4 Seaman v. Erie R. R. Co. 2 Ben. 132; The Emblem, 2 Ware, (Dav.) 61.

5 Barney v. Eaton, 1 Biss. 242.

6 The Spaulding, 1 Brown Adm. 310.

7 The Spaulding, 1 Brown Adm. 310.

8 The John Wurts, Olcott, 470; Lewis v. The Elizabeth and Jane, 1 Ware, 41; Wilkie v. The St. Petre, Bee, 83.

9 The John Gilpin, Olcott, 81; The Maria, Edw. Adm. 175; The Eugene, 3 Hagg. Adm. 156; The Queen Mab, Ibid. 242; The Dantzic Packet, Ibid. 383; The Effort, Ibid. 165; Hand v. The Elvira, Gilp. 60.

10 The Nicolai Heinrich, 22 Eng. L. & E. 615.

11 The Missouri's Cargo, 1 Sprague, 270, distinguishing The Boston, 1 Sum. 328.

12 The Blenden Hall, 1 Dods. 414; Barney v. Eaton, 1 Biss. 242.

13 Collins v. The Fort Wayne, 1 Bond, 484; The Neptune, 1 Hagg. Adm. 227; Jones v. The Massasoit, 7 Law Rep. 522.

14 The Williams, 1 Brown Adm. 216; The Emulous, 1 Sum. 207; The Centurion, 1 Ware, 477; Bearse v. Pigs of Copper, 1 Story, 314.

15 Collins v. The Fort Wayne, 1 Bond, 476.

16 The Bee, 1 Ware, 332; Harley v. Gawley, 2 Sawy. 10; Lewis v. The Elizabeth and Jane, 1 Ware, 44; The Aquila, 1 C. Rob. 32.

17 Harley v. Gawley, 1 Sawy. 9; Baker v. Hoag, 7 N. Y. 555; Hamilton v. Davis, 5 Burr. 2732.

18 The Amethyst, 2 Ware (Dav.) 20.

19 The Henry Ewbank, 1 Sum. 400; The Amethyst, 2 Ware (Dav.) 20; The Eugene, 3 Hagg. Adm. 156; The Effort, 3 Hagg. Adm. 165; The Blenden Hall, 1 Dods. 414.

20 The Salacia, 2 Hagg. Adm. 262.

21 One Anchor and Chain, 2 Low. 550.

§ 328. Contract for services.—Customs and wages of the sea authorize the master to employ his vessel and crew in a salvage service in rescuing property from destruction.[1] Parties may agree on the amount of compensation, or on the principles on which it shall be adjusted, and such agreements, if fairly made, and no advantage be taken of ignorance or distress, they are upheld;[2] where neither fraud nor oppression is shown, though it be contingent, and be for a sum much less than the court would have awarded,[3] and although it may prove hard on the salvors,[4] but where the rate in a contract is exorbitant, the contract will not be upheld.[5] An agree-

ment may be made by the master of a vessel in distress, provided there is a clear understanding of the nature of the agreement, made with fairness and impartiality to all concerned;[6] as for the recovery of the cargo of a sunken ship,[7] or to labor for the rescue of the ship from an impending peril,[8] or for service;[9] but it will not be enforced where the salvor has taken advantage of his power to make an unreasonable bargain.[10] A contract for salvage made by a master, the sunken boat being within easy reach of all parties interested must be closely scrutinized.[11] The true rule of construing salvage contracts is, that they shall be presumed *prima facie* to be fair, but if proven to be unconscionable, the court would refuse to enforce them.[12] They must not only be fairly and honestly made, but the evidence must show a definite and explicit bargain.[13] The contract is enforceable as it stands, when it is free from all fraud, deception, mistake, or circumstances of controlling necessity, and any claim for salvage will be denied.[14] If there is a hiring or bargain, without fraud or mistake, the terms of such agreement are adhered to as the rule of computation; but if no agreement is made, remuneration is awarded with regard to considerations appropriately governing salvage cases.[15] An agreement for specific compensation does not alter the nature of the service, but furnishes a rule of compensation, especially where the compensation depends on success.[16] It is none the less a maritime contract, because the compensation did not depend on the result,[17] but a contract for a mere attempt is inconsistent with a salvage service.[18]

1 Roff *v.* Wass, 2 Sawy. 395; The Boston, 1 Sum. 328; The Centurion, 1 Ware, 483.

2 Harley *v.* Bars R. R. Iron, 1 Sawy. 2; The Emulous, 1 Sum. 207; The Independence, 2 Curt. 350; Bearse *v.* Pigs of Copper, 1 Story, 314; The A. D. Patchin, 1 Blatchf. 414; The True Blue, 4 Moore P. C. C. 96; The Henry, 2 Eng. L. & E. 564. But inequitable agreements will not be enforced—The Wexford, 6 Ben. 119.

3 Harley *v.* Bars of R. R. Iron, 1 Sawy. 1; Bowley *v.* Goddard, 1 Low. 157; The True Blue, 4 Moore P. C. C. 96; S. C. 2 W. Rob. 176; The Catherine, 6 No. of Cas. 43; The Mulgrave, 2 Hagg. Adm. 78; Bondies *v.* Sherwood, 22 How. 214; The British Empire, 6 Jur. 608; The A. D. Patchin, 1 Blatchf. 414; The Helen A. George, Swabey, 368; The Enchantress, 1 Lush. 93; Eads *v.* The H. D. Bacon, Newb. 274.

4 The Silver Spray's Boilers, 1 Brown Adm. 349.

5 Tons of Coal, 7 Ben. 343.

6 Collins *v.* The Fort Wayne, 1 Bond, 482; The True Blue, 4 Moore P. C. C. 96; S. C. 2 W. Rob. 176; The Lady Flora Hastings, 3 W. Rob. 120.

7 Harley *v.* Bars R. R. Iron, 1 Sawy. 1; The Reward, 1 W. Rob. 174; The Princess Alice, 3 W. Rob. 138; The Emulous, 1 Sum. 207; The Centurion, 1 Ware, 477.

8 The Williams, 1 Brown Adm. 216; The A. D. Patchin, 1 Blatchf. 414. And see The Independence, 2 Curt. 350.

9 The Betsey, 7 Jur. 755; The Emulous, 1 Sum. 210.

10 Post *v.* Jones, 19 How. 160; The Emulous, 1 Sum. 210; The Silver Spray's Boilers, 1 Brown Adm. 354; The John G. Paint, 1 Ben. 550; The A. D. Patchin, 1 Blatchf. 414.

11 Tons of Coal, 7 Ben. 343.

12 The H. D. Bacon, Newb. 279. But see The Emulous, 1 Sum. 207; Bearse *v.* Pigs of Copper, 1 Story, 314; Schultz *v.* The Nancy, Bee, 139.

13 Bowley *v.* Goddard, 1 Low. 157; The Salacia, 2 Hagg. Adm. 262.

14 The Silver Spray's Boilers, 1 Brown Adm. 355; The Whitaker, 1 Sprague, 229; The True Blue, 4 Moore P. C. 90; S. C. 2 W. Rob. 176; The Henry, 2 Eng. L. & E. 564; The Phantom, Law Rep. 1 Ad. & E. 58; The Salacia, 2 Hagg. Adm. 262; The A. D. Patchin, 1 Blatchf. 414; Bearse *v.* Pigs of Copper, 1 Story, 314; The Marquette, 1 Brown Adm. 369; Squire *v.* Tons of Iron, 2 Ben. 21; The Independence, 2 Curt. 350.

15 The H. B. Foster, Abb. Adm. 229; The Britain, 1 W. Rob. 50; The Betsey, 2 W. Rob. 167; The True Blue, 4 Moore P. C. C. 96; The Mulgrave, 2 Hagg. Adm. 78; The Traveller, 3 Hagg. Adm. 370; The Zephyr, 2 Hagg. Adm. 43.

16 The Silver Spray's Boilers, 1 Brown Adm. 354; The Marquette, Ibid. 371; The William Lushington, 7 Notes of C. 361; The Catharine, 6 Notes of C. 43; The A. D. Patchin, 1 Blatchf. 229; The Independence, 2 Curt. 350; The Whitaker, 1 Sprague, 229; Williams *v.* The Jenny Lind, Newb. 443; The Camanche, 3 Wall. 477; The Emulous, 1 Sum. 207; Collins *v.* The Fort Wayne, 1 Bond, 481.

17 The Circassian, 2 Ben. 172; The A. D. Patchin, 1 Blatchf. 414; The Susan, 1 Sprague, 504; The Versailles, 1 Curt. 353.

18 The Mulgrave, 2 Hagg. Adm. 78; The Louisa Jane, 2 Low. 297.

§ 329. Contract as a bar.—Where there is a contract on certain stipulations, the party contracting cannot abandon it and claim salvage.[1] So a person hired to assist, with knowledge of the salvage contract of his employer, is limited to the contract price.[2] Services performed in aid of a ship in danger of destruction, attended with danger to life, and unusual in severity, are circumstances sufficient to change the contract of affreightment, agreeing to tranship for a remuneration, "according to the services rendered and risk encountered," into a salvage contract.[3] Where a steamer was engaged to go to a vessel in distress, with the understanding that her time and services should be liberally paid, if accepted and were successful, it was an agreement for salvage;[4] but the fact that services were rendered in compliance with a request from the owner does not create a special contract.[5] Where services are performed in pursuance of an express contract, no action *in rem* can be maintained therefor.[6] Nothing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful, will operate as a bar to a meritorious claim for salvage.[7] The evidence must show a definite and explicit bargain.[8] The presumption is that the services were rendered for a salvage compensation, but this may be rebutted by evidence.[9] On a conflict of posi-

salvage is not a bar to another suit by other salvors for other services.[8] That the libellants would not refer their claim for salvage as agreed is no bar to the suit,[9] and if separate libels are filed, they may be consolidated by the court for its own convenience.[10] It is the duty of the salvors, on bringing suits, to make all co-salvors parties, that one final decree may be had,[11] but they are not deprived of their remedy because other salvors will not join;[12] they may petition the court for compensation out of the funds in the registry.[13] The interest of co-salvors is several, and seamen may bring actions against the master for their shares.[14] They may bring action against the property saved, if settlement was made with the master without their consent.[15] A foreign consul may petition for the payment into the registry, proceeds of a sale of property libelled for salvage where absent citizens of his country are interested.[16] A purchaser of a ship liable to be restored after capture, cannot bring a claim for salvage.[17] In ordinary cases there should be but one libel, and costs should be allowed but for one suit;[18] the same considerations of public policy are regarded in disposing of the question of costs as those which affect salvage awards.[19] After the payment of salvage by a surety in a stipulation bond, if the owner of the goods claims and receives for the loss as ascertained by the decree or directs payment to be made, it is a presumption of satisfaction on the adjustment of average.[20] The court may determine to whom the residue of the property shall be delivered, and may decide whether a capture by a foreign nation is valid.[21] Salvage was awarded in a case where both vessels belonged to the same owner.[22] A claim for salvage may be maintained in a court of admiralty, if there is no local custom making the service gratuitous.[23]

1 The Independence, 2 Curt. 356; The Emblem, 2 Ware, 61; The Centurion, 1 Ware, 479; The Trelawney, 3 C. Rob. 216; The Hope, 3 W. Rob. 215.

2 Brevoor v. The Fair American, 1 Pet. Adm. 187.

3 Lipson v. Harrison, 24 Eng. L. & E. 208.

4 Miller v. Kelly, Abb. Adm. 564.

5 The Boston, 1 Sum. 329; The Trelawney, 3 C. Rob. 216; The Hope, 3 C. Rob. 215; Harley v. Gawley, 2 Sawy. 10; The Louisa Jane, 2 Low. 295.

6 Ex parte Cahoone, 2 Mason, 88; Nicholson v. Chapman, 2 H. Black. 254.

7 The John Gilpin, Olcott, 82; The Emulous, 1 Sum. 210; American Ins. Co. v. Coster, 3 Paige, 323; Hobart v. Drogan, 10 Pet. 108; U. S. v. Coombs, 12 Pet. 72.

8 The Merrimac, 1 Ben. 68.

9 Coffin v. The John Shaw, 1 Cliff. 230.

10 Rich v. Lambert, 12 How. 347; The London Merchant, 3 Hagg. Adm. 394.

11 The Hessian v. The Edward Howard, Newb. 322; The Boston, 1 Sum. 328.

12 The Blackwall, 10 Wall. 12; Evans v. The Charles, Newb. 339.

13 The Blackwall, 10 Wall. 12; The Henry Ewbank, 1 Sum. 400.

14 The Centurion, 1 Ware, 477.

15 The Britain, 1 W. Rob. 40; The Sarah Jane, 2 W. Rob. 110.

16 The Adolph, 1 Curt. 89; Rowe v. The Brig ———, 1 Mason, 372; The Invincible, 1 Wheat. 238; The Ann, 3 Wheat. 435; The Divina Pastora, 4 Wheat. 52; The Bee, 1 Ware, 335; The Henry Ewbank, 1 Sum. 400; The Bello Corrunes, 6 Wheat. 152.

17 Conlon v. The Neptune, 2 Pet. Adm. 358; Warder v. La Belle Creole, 1 Ibid. 31.

18 The Charles Henry, 1 Ben. 8; Forbes v. The Merrimac, Ibid. 68.

19 The Joseph C. Griggs, 1 Ben. 81.

20 Eckford v. Wood, 5 Ala. 136; Robinson v. George's Ins. Co. 17 Me. 131.

21 McDonough v. Dannery, 3 Dall. 188.

22 P. M. S. S. Co. v. Bales of Gunny Bags, 3 Sawy. 187.

23 Fifty Thousand Feet of Timber, 2 Low. 64.

3 The Rebecca Clyde, 5 Ben. 103; The Reward, 1 W. Rob. 174. See SALVAGE.

4 The Clarita & Clara, 23 Wall. 11; Sturgis v. Boyer, 24 How. 123; Sproule v. Hemmingway, 14 Pick. 1; The James Gray v. The John Fraser, 21 How. 184.

§ 333. Contract of towage.—Where all is fair the court cannot break in upon agreements for towage and allow salvage properly so called.[1] An engagement to tow does not impose either an obligation to insure,[2] or the liability of a common carrier.[3] The law applicable to common carriers is one of great rigor, and ought not to be extended or applied to new cases.[4] Where the owner employed a tow-boat, and the master of the tow-boat surrendered direction to the pilot employed by the ship, it is a bailment or hiring of the tug for a reward.[5] The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services.[6] He is responsible for ordinary skill and diligence, and may contract for a more restricted liability than the law imposes,[7] but the master cannot limit his responsibility by a notice given at the commencement of the voyage, that it must be at the risk of the tow.[8] The words in a former contract—"at the risk of the master and owners of the boat"—are not sufficient to warrant the court in holding that they were a part of the second contract.[9] The burden is on him who alleges the breach of a towage contract to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness to his injury in the performance.[10] The lien for towage is waived by laches as against a *bona fide* purchaser,[11] or by assignment of the claim.[12] The making of a certificate of the amount to be paid for towage under a threat to attach the vessel is not such duress as will avoid its effect.[13] A master's certificate will not be set aside unless it clearly appear that the sum named is so unreasonable as to raise a suspicion of fraud.[14] Admiralty courts have jurisdiction over contracts for towage.[15]

1 The Williams, 1 Brown Adm. 218; The Harbinger, 20 Eng. L. & E. 641; The Graces, 2 W. Rob. 294; The Princess Alice, 3 W. Rob. 138; The Kingalock, 1 Spinks Ec. & Ad. 263.

2 The Webb, 14 Wall. 406.

3 The Webb, 14 Wall. 406; Abbey v. The R. L. Stevens, 11 Law Rep. N. S. 41; Brawley v. The Jim Watson, 2 Bond, 356; The Princeton, 3 Blatchf. 54; The Angelina Corning, 1 Ben. 112; Alexander v. Greene, 7 Hill, 533; S. C. 3 Hill, 9; Pennsylvania D. & M. N. Co. v. Dandridge 8 Gill & J. 248; Leonard v. Hendricksen, 18 Pa. St. 49; Hays v. Paul, 51 Pa. St. 134; Brown v. Clegg, 63 Pa. St. 51; Caton v. Rumney, 13 Wend.

387; Wells *v.* S. N. Co. 2 N. Y. Y. 204; The New Philadelphia, 1 Black, 62; Merrick *v.* Brainard, 3 Barb. 574; White *v.* The Mary Ann, 6 Cal. 462; Ashmore *v.* Penn. S. T. Co. 4 Dutch. 180; The Julia, Lush. 224; The Neaffie, 1 Abb. U. S. 468, denying Vandersilce *v.* The Superior, 6 Notes of C. 607; 3 Law Rep. N. S. 339; The Thomas Kiley, 5 Ben. 308, denying Walston *v.* Myers, 5 Jones Law, 174; The Merrimac, 2 Sawy. 592, disapproving Wells *v.* Steam Nav. Co. 2 N. Y. 204. And see *contra*, Smith *v.* Pierce, 1 La. 129; Adams *v.* N. O. Steamship Co. 11 La. 46.

4 The Neaffie, 1 Abb. U. S. 467; Boyce *v.* Anderson, 2 Pet. 150.

5 Reeves *v.* The Constitution, Gilp. 579; The Merrimac, 2 Sawy. 587.

6 The Webb, 14 Wall. 406; The Merrimac, 2 Sawy. 587.

7 Alexander *v.* Greene, 7 Hill. 533; The Stranger, 1 Brown Adm. 295; The Merrimac, 2 Sawy. 592; Caton *v.* Rumney, 13 Wend. 387; The Thomas Kiley, 5 Ben. 307; The Lyon, 1 Brown Adm. 59; The Stranger, Ibid. 281; The Oconto, 5 Biss. 460; The Neaffie, 1 Abb. U. S. 468; The Angelina Corning, 1 Ben. 109; The W. E. Cheney, 6 Ben. 178; The J. L. Hasbrouck, 6 Ben. 272.

8 The Syracuse, 6 Blatchf. 2; Vandersilce *v.* The Superior, 4 Pa. L. J. 388.

9 The Thomas Kiley, 5 Ben. 301.

10 The Webb, 14 Wall. 406.

11 The Detroit, 1 Brown Adm. 141.

12 Sturtevant *v.* The George Nicholaus, Newb. 450.

13 The Detroit, 1 Brown Adm. 141; The Senator, Ibid. 544.

14 The Senator, 1 Brown Adm. 546; The Boston, 1 Sum. 328; Wilcox *v.* Harland, 23 Pick. 167; Waller *v.* Cralle, 8 B. Mon. 11; Eddy *v.* Herrin, 17 Me. 338; Alexander *v.* Pierce, 10 N. H. 494; The Packet, 3 Mason, 255; United Ins. Co. *v.* Scott, 1 Johns. 106.

15 Ward *v.* The Banner, 14 Law Rep. 485.

§ 334. Duty of tug to tow.—The tug is bound to the tow to perform the contract, without deviation; and in case of deviation she will be responsible for the damage occasioned thereby.[1] The measure of duty of a tug is reasonable diligence and ordinary skill; it is not an insurer of the safety of the tow, nor held to the highest maritime skill.[2] In case of danger it is the duty of the tug to protect the tow, either by slowing, stopping, or sounding,[3] or to lie by till the wind subsides.[4] The tug is only bound to employ those means consistent with her own safety; she is not obliged to lie by the tow when that would endanger herself.[5] Where the tow-line parts at night, during a severe storm, and the master of the tug is unable to pick up the line, to discover the lights of the tow, or to make an effort to regain it without great peril, he may abandon the tow.[6] Where the tug abandoned her tow, the burden of proof is on the tug to show sufficient excuse.[7]

1 The W. E. Cheney, 6 Ben. 178.

2 The Mosher, 4 Biss. 274; The Thomas Kiley, 5 Ben. 307; Caton *v.* Rumney, 13 Wend. 387.

3 The Armstrong, 1 Brown Adm. 134; The Morton, Ibid. 137.

4 The Mohler, 21 Wall. 230; S. C. 4 Amer. Law Ti. 145.

5 The Mosher, 4 Biss. 274.

6 The Clematis, 1 Brown Adm. 499.

7 The Clematis, 1 Brown Adm. 502; Lawrence v. Minturn, 17 How. 100.

§ 335. Obligations of master.—The master of the tug is bound to see that the tow is properly made up, and that the lines are strong and securely fastened; and the fact that it does not hold is evidence that the duty is not performed[1]—and in making it up, to regard dangers incident to any portion of the route covered by the undertaking.[2] He is bound to know the sailing qualities of the vessel which he had towed into a harbor on several previous occasions;[3] to know the condition of the harbor and effect of the winds and waves, and the necessary course to safely enter the harbor;[4] he is bound to know the ordinary channel, but his responsibility is changed where the channel shifts;[5] he is bound to know the width of his steamers and their tows, and whether when lashed together he can run them safely between piers through which he attempts to pass; the currents that set about the piers in different hights of the water, and whether his steamers and their tows will safely pass over an obstruction which in low water they could not pass over.[6] He is the pilot of the voyage and the best judge of the sufficiency of the tow to resist the weather. and of the adequacy of the crew to do what may be required for her protection.[7] It is his duty so to navigate as to avoid collisions.[8] Tugs having vessels in tow in narrow channels should avoid placing more than one vessel on each side, but should tow the remainder astern.[9] He is not authorized to act as wheelsman,[9] and proof of local customs authorizing him so to act is not admissible.[10] There should be some responsible person in charge of the navigation of the tug, separate and distinct from the wheelsman.[11] A tug whose chief officer also acts as wheelsman is insufficiently manned.[12]

1 The Quickstep, 6 Wall. 665; The Sweepstakes, 1 Brown Adm. 509.

2 The Sweepstakes, 1 Brown Adm. 509.

3 The Margaret, 5 Biss. 353; S. C. 94 U. S. 353; Vanderslice v. The Superior, 4 Pa. L. J. 388.

4 The Margaret, 5 Biss. 353; S. C. 94 U. S. 353; Vanderslice v. The Superior, 4 Pa. L. J. 388.

5 The Mosher, 4 Biss. 274; The Lady Pike, 2 Biss. 141.

6 The Thomas Kiley, 5 Ben. 301.

7 The U. S. Grant, 7 Ben. 210; The Secret, 8 Mitch. Mar. Reg. 116; The Civilta and Restless, 6 Ben. 323.

8 Flannery *v.* The Ontario, 4 Pa. L, J. 312.

9 The Victor, 1 Brown Adm. 449; The Coleman, Ibid. 456.

10 The Coleman, 1 Brown Adm. 456.

11 The Victor, 1 Brown Adm. 449; The Coleman, Ibid. 456.

12 The Coleman, 1 Brown Adm. 459; The Zouave, Ibid. 110; The Armstrong, Ibid. 130.

§ 336. Mutual responsibilities of tug and tow.—The vessel in tow is not excused from keeping a close watch and obeying all signals.[1] Where tow-lines are used the tow is bound to obey all proper orders of the master of the tug.[2] The tow, when varying its line of direction to the limit of its capacity would not be sufficient, must have means of disconnecting herself from the moving power to protect others from contact with her.[3] The tow is bound to prevent a collision if she can.[4] If the master of the tow refuse or neglect such reasonable obedience, or fails in reasonable skill or attention to duty, the owner of the tug is not to be held responsible for the consequences.[5] Where a vessel is drawn by a hawser extending from the forepart to the stern of the tug, both vessels have duties to perform, and it may then happen that either or both may be in fault in case of accident.[6] A custom that the tow is bound to furnish the tow-line will not affect the rights of the master unless knowledge of it was brought home to him.[7] If in the course of the performance of the contract any inevitable accident happened to one, without any default on the part of the other, it would create no liability; but otherwise if the wrongful act of either occasioned damage to the other.[8] Where the tug negligently places the tow in peril, from which she is lost, it is no excuse that the tow might have been saved but for a mistake or want of skill in the crew of the latter.[9]

1 The Maria Martin, 2 Biss. 41.

2 Dutton *v.* The Express, 3 Cliff. 462.

3 The Express, Olcott, 267; The Hope, 2 W. Rob. 9.

4 The Morton, 1 Brown Adm. 140; Heckscher *v.* McCrea, 24 Wend. 304; Taylor *v.* Read, 4 Paige, 561; Emerson *v.* Howland, 1 Mason, 45; Miller *v.* Mariners' Church, 7 Me. 51. See COLLISION.

5 Dutton *v.* The Express, 3 Cliff. 462.

6 Dutton *v.* The Express, 3 Cliff. 462.

7 The Merrimac, 2 Sawy. 587.

8 The Thomas Kiley, 5 Ben. 309.

9 The Merrimac, 2 Sawy. 587.

§ 337. Responsibility of tug.—The tug is responsible for the navigation of both vessels, and her duties are those of a carrier for hire.[1] Where the tow is lashed to the side of the tug, and depends wholly upon it for motion,

power, and steerage, the responsibility for the navigation of both is wholly on the tug.[2] Though the tow should be properly steered, and follow in the wake of the tug, the responsibility as to the mode, manner, and speed of entrance, and the course pursued, is with the tug.[3] Where a tow at an intermediate port was turned over to the master of another tug, the latter is responsible for any negligence in its action.[4] When the tug under her own master and crew, and in the usual and ordinary course of her employment, undertakes to transport another vessel which for the time being has neither her officers nor crew on board, she must be held responsible for the proper navigation of both vessels.[5] The tug will be held liable for the fault of the pilot in not sooner taking measures to avoid loss or damage to the tow.[6] If a steamer is hired for the purpose of towing a vessel to which she is fastened, and both are under the direction of a licensed pilot, the owners of the tow are not entitled to damages unless the injury was caused by the undue negligence of the pilot.[7] A tug will not be responsible for damages done by her tow except it be proved that the injury was owing to want of care or skill on the part of the tug.[8] If a tug negligently causes the tow to collide with another vessel, the tug and her owners will be responsible for the damage.[9] A schooner having taken the chances of entering in a storm a harbor with a shifting channel, the tug is not responsible, in the absence of proof of negligence, if the schooner touches some ridge of sand.[10] Where several courses are open to the master of a tug in an emergency, and damage results to the tow, clear proof must be given that the course taken was manifestly the most dangerous.[11]

1 The Merrimac, 2 Sawy. 567.

2 Dutton *v.* The Express, 3 Cliff. 462; The Merrimac, 2 Sawy. 594; The Olive Baker, 4 Ben. 173; The Cleadon, 1 Lush. 158; Philadelphia &c. R R. Co. *v.* The J. H. Gautier, 5 Ben. 469; 11 Am. Law Reg. 769; 5 Am. L. T. 87; 15 Int. Rev. Rec. 39.

3 The Margaret, 94 U. S. 253.

4 The Clematis, 1 Brown Adm. 432.

5 The W. H. Clark, 5 Biss. 307; The Maria Martin, 12 Wall. 31; S. C. 2 Biss. 44; The Mabey & Cooper, 14 Wall. 212; Sturgis *v.* Boyer, 24 How. 110.

6 The Niagara, 6 Ben. 469.

7 Reeves *v.* The Constitution, Gilp. 579.

8 The Express, 1 Low. 258.

9 Jackson *v.* Easton, 7 Ben. 193; Sproule *v.* Hemmingway, 14 Pick. 1; Sturgis *v.* Boyer, 24 How. 110. See COLLISION.

10 The Mosher, 4 Biss. 274.

11 The Mohawk, 7 Ben. 139.

§ 338. Responsibility of owners of tug.—Owners of tow-boats are liable for injuries sustained by the vessels in tow, or by other vessels, by a collision resulting from the negligence of persons in charge of the tug.[1] The master being selected by them, the owners are responsible for his qualifications.[2] They are responsible for accidents, the result of the want of proper knowledge on the part of the captain of the difficulties of navigation in the waters in which the steamer plies.[3] So where the master did not pursue the channel which he was requested and had tacitly consented to take, and because he had given, on entering the channel, confused and contradictory orders, which led to the accident.[4] They are liable upon proof of negligence in performing the engagement made for moving the tow, and not otherwise.[5]

1 The Caleb, 4 Ben. 15; The Blanche Page, Ibid. 186; The M. A. Lennox, Ibid. 190; The George Farrell, Ibid. 316; The Deer, Ibid. 363; The Cambridge, Ibid. 366. See COLLISION.

2 Dutton v. The Express, 3 Cliff. 462.

3 The Lady Pike, 21 Wall. 1.

4 Dutton v. The Express, 3 Cliff. 462.

5 The Neaffie, 1 Abb. U. S. 465; The Angelina Corning, 1 Ben. 109.

§ 339. Liability of tug for injury to tow.—The tug will be liable for damages occasioned by taking the tow round a dangerous point with a very long hawser.[1] The tug might be held liable upon the admissions of her master, coupled with the transaction between him and the owner of the tow.[2] Where charterers were to pay for the towage, and employed the tug, whose boiler exploded and injured and sunk the vessel, the charterers were no more than agents of the owners, and were not liable for the loss of the vessel.[3] Where damage was caused by the breaking of the tug's rudder-chain from a defect which ought to have been known, the tug was held liable.[4] Where the peril, which resulted in the loss of the tow, had already been incurred by the negligence of the tug, the tug will be liable, even if the tow might have avoided the damage, had her anchor been larger and the chain stronger;[5] the tug will be liable, notwithstanding the tow was rotten, unless the condition of the ship was the sole cause of the injury,[6] and that a sound boat would not have sustained any damage from the collision is no defense.[7] The tug, using ordinary care, is not liable for damage caused by a sudden and unexplained sheering of the tow to the right or left.[8] Where the accident to the tow was occasioned by a sudden gust of wind, the tug is not liable.[9] Where the

tow was sunk in consequence of the parting of the hawser, the tug was held liable for the damage.[10]

1 The Cayuga, 16 Wall. 177.

2 The U. S. Grant, 7 Ben. 337.

3 Jackson v. Easton, 7 Ben. 191.

4 The M. M. Caleb, 10 Blatchf. 468; 5 Ben. 163; McKinlay v. Morrish, 21 How. 343.

5 The Merrimac, 2 Sawy. 597; 14 Wall. 199; Union S. S. Co. v. N. Y. S. & V. S. S. Co. 24 How. 307; The Webb, 14 Wall. 406.

6 The Workman, 1 Low. 504.

7 The Sam Gaty, 5 Biss. 190; The Deer, 4 Ben. 357; S. C. 4 Amer. L. T. 142; The John Adams, 1 Cliff. 415; The Granite State, 3 Wall. 310; Inman v. Funk, 7 B. Mon. 538.

8 The Stranger, 1 Brown Adm. 285; 4 Amer. L. T. 13 Int. Rev. Rec. 150; The Angelina Corning, 1 Ben. 109.

9 The Lady Pike, 3 Biss. 113.

10 The Francis King, 7 Ben. 11; The Sweepstakes, 1 Brown Adm. 514; The Quickstep, 4 Ben. 173.

§ 340. Negligence.—The liability of the tug to the tow for injuries applies exclusively to injuries resulting from the violation or neglect of some duty devolving upon that class of employment.[1] The duty of a tug not to injure the tow does not arise out of the towage contract, but is imposed by law, and she is liable in admiralty for negligent navigation in causing the tow to strike against a pier by which she was sunk.[2] The tug is liable for damages, whether towing under a contract or not,[3] for negligent navigation.[4] It is negligence in the pilot of a tug not to have a lookout;[5] so, towing a vessel on fire with a hempen hawser is negligence.[6] Where the presence of a sunken pier was known, it was negligence to tow the barge to a bulkhead near it.[7] The running of a barge upon a pier is conclusive evidence of negligence in the absence of any proof of a *vis major*.[8] Where the water to be crossed was not an ordinary one, and the peculiar difficulties and dangers of the voyage were well known to the master of the tug, and unknown to the master of the tow, there was a want of ordinary skill and diligence in starting on the last of the ebb tide to encounter the flood tide, which always made a rough and dangerous sea.[9] Where a tug took a canal-boat to tow her through a dangerous channel, and there was soft ice which crowded off the head of the tow, and she was run upon a rock and sunk, it was negligence in the tug to proceed, as she should have waited till the field of ice had passed.[10] So long as the tow was kept at a safe distance from the shore, and from all known objects, it is not negligence in case of disaster from an unknown peril.[11] A loss occasioned by striking on an

unknown rock should be borne by the vessel sustaining the injury.[12] Where the tow struck the shore-ice and sank, the master having known in advance of the danger, and the tug having refused to take pay or be responsible for damage, it was not negligence in the tug to undertake the service.[13] The burden of proof is on the tow to show negligence, when the obstruction to the navigation was unknown.[14] So, where all care was taken to avoid obstructions, the burden of proof of negligence is on the tow.[15] Where no negligence is shown in the tug she is not liable,[16] but if the tug is navigated so unskilfully that the tow is in danger of sinking another vessel, and to prevent injury that vessel puts out a fender by which the tow is injured, the tug is liable for the damage.[17] Where a tow was sunk by a collision, without any fault on the part of the tug, it is not the duty of the tug to place a light over the wreck.[18]

1 The Stranger, 1 Brown Adm. 286; The Quickstep, 9 Wall. 665.

2 The Brooklyn, 2 Ben. 547; Philadelphia &c. R. R. Co. v. Derby, 14 How. 468.

3 The Deer, 4 Ben. 335; S. C. 4 Am. L. T. 142; Philadelphia &c. R. R. Co. v. Derby, 14 How. 468; The Syracuse, 6 Blatchf. 2.

4 The U. S. Grant, 7 Ben. 337.

5 The Niagara, 6 Ben. 469.

6 The Clarita and Clara, 5 Ben. 375; 23 Wall. 1.

7 The Deer, 4 Ben. 335; S. C. 4 Am. L. T. 142.

8 The Deer, 4 Ben. 335; S. C. 4 Am. L. T. 142.

9 The Merrimac, 2 Sawy. 594; The Deer, 4 Ben. 353; The Caleb, 4 Ben. 15; The Blanche Page, 4 Ben. 186; The M. A. Lennox, 4 Ben. 190; The Olive Baker, 4 Ben. 173.

10 The U. S. Grant, 7 Ben. 337.

11 The Angelina Corning, 1 Ben. 112.

12 The Angelina Corning, 1 Ben. 112.

13 The Alfred and Edwin, 7 Ben. 137.

14 The America, 6 Ben. 122.

15 The America, 6 Ben. 122.

16 The Alfred and Edwin, 7 Ben. 137. And see The Mohawk, 7 Ben. 139.

17 The New Philadelphia, 1 Black, 62.

18 The Swan, 11 Blatchf. 285.

§ 341. Instances.—Where a steamer undertook to tow a barge, and in doing so ran the barge on a sunken pier, and she was sunk, and the master of the tug was aware of the existence of the sunken pier, the tug was liable for the loss of the barge;[1] so, where the tow struck against a wharf.[2] Where the tow sprung a leak while being towed, and was afterward cast off by the tug in such a way that she failed to reach a dock, and drifted off

into deep water and sank, the tug will be liable for the total of all the cargo uninjured by the leak.[3] A steamer towing loaded barges, attempting to run bridge piers in tempestuous weather, will be liable for loss or damage by reason of a sudden gust of wind driving the tow against the pier, by which she was destroyed.[4] A steamer undertaking to tow a ship, and having a well-known and straight course to pursue, suffered the ship to run aground; she was held liable, especially as there was evidence that her compasses were untrue, notwithstanding there were variable currents and a thick fog.[5] Where the tug towed the vessel through an evidently unsafe place, it is liable for all risks of towage, including damage from ice, where the tug accepted employment from an unauthorized agent.[6] Where a tug liable for sinking a canal boat, which she was towing, was released from her liability by consignees of the cargo, it will not operate to release the master of the canal boat from a decree for costs of raising the cargo and other damages.[7] Where a tug-boat voluntarily went to rescue a ferry-boat which was on fire, and took her in tow, but by negligent and unskillful management suffered her to come into collision with a third vessel, which was injured in consequence, the owners of the burning ferry-boat were not liable.[8] Damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault.[9] Where a party hired a canal boat, agreeing to pay for the towage, he is merely the agent of the owner, and not liable for damage caused by the explosion of the boiler of the tug.[10] Where injury was caused by the negligence of the tug, the tow is not liable,[11] but if a collision occur between a steam tug and her tow, owing to the fault of the tow, she is liable.[12] If the orders of the pilot were obeyed the owners of the tow would not be responsible, but if not obeyed, they would be.[13]

1 Connie *v.* The Deer, 4 Ben. 352; S. C. 4 Amer. L. T. 142; Home Ins. Co. *v.* The Mollie Mopler, 4 Amer. L. T. 145; 2 Ben. 506.

2 The Workman, 1 Low. 504.

3 The J. L. Hasbrouck, 6 Ben. 272.

4 Home Ins. Co. *v.* The Mollie Mohler, 4 Amer. L. T. 145; S. C. 21 Wall. 230; The Lady Pike, 2 Biss. 113.

5 The Webb, 14 Wall. 406.

6 The James A. Wright, 3 Ben. 248.

7 The Francis King, 7 Ben. 380.

8 The Clarita and Clara, 23 Wall. 11.

9 The Webb, 14 Wall. 406.

10 Jackson *v.* Easton, 7 Ben. 491.

11 The Express, Olcott, 309; Sproule *v.* Hemmingway, 14 Pick. 1.

12 The Julia, Lush. 224.

13 The Duke of Sussex, 1 W. Rob. 270; The Gipsey King, 2 W. Rob. 537; The Christina, 3 W. Rob. 27; The Kingston-by-Sea, Id. 152; The Ticonderoga, Swabey, 215; The Unity, Id. 102; The Cleadon, Lush. 158.

§ 342. Measure of liability.—The damages in case of injury to a vessel are, that resulting from want of ordinary skill and diligence in the management of the tow, and for subsequent damages naturally resulting;[1] by running her against a wharf, and the natural and necessary consequences of the collision to the vessel in her actual state of repairs;[2] in case of grounding, the expense of protest before unloading may be allowed as part of the damages, although it turned out that the protest was unnecessary;[3] loss from inability to use the injured vessel deemed a part of the damages.[4] Where the tow began to leak on the voyage, and was cast off in order to go to a dock, which she failed to reach and sank, the damages resulting from the actual sinking must be apportioned between the owners of the cargo and the owners of the tug, and such damages over and above the damage it had sustained at the time it was cast off must be apportioned between the owners of the tug and of the tow.[5]

1 The Stranger, 1 Brown Adm. 281. And see The Clematis, Ibid. 432; The Mosher, 4 Biss. 274.

2 The Workman, 1 Low. 504.

3 The Michael Groh, 1 Brown Adm. 419.

4 The M. M. Caleb, 10 Blachf. 468; 5 Ben. 163.

5 The J. L. Hasbrouck, 5 Ben. 244; 6 Ibid. 272; The Atlas, 4 Ben. 27; The Milan, Lush. 388; Hay v. LeNeve, 2 Shaw, 395.

CHAPTER XVI.

PILOTAGE.

§ 343. Statute regulations.
§ 344. License to pilots.
§ 345. Duties of pilots.
§ 346. Authority of pilots.
§ 347. Liability for negligence.
§ 348. Compensation of pilots.
§ 349. Half pilotage.

§ 343. Statute regulations.—The power of Congress to regulate pilotage is paramount,[1] and any State laws are immediately abrogated, when an act is passed by Congress which conflicts therewith;[2] but, in the absence of congressional legislation, or under permission of Congress, State laws are valid,[3] and are to be liberally construed.[4] By the Act of February 27th, 1867, a sea-going vessel, subject to the navigation laws of the United States when navigating any of the waters thereof, is required to be in charge of a pilot, licensed by the inspectors of a steam vessel.[5] The legislature of a country may oblige foreign ships, inward bound, to take a pilot at a convenient station beyond three miles from the shore.[6] The Pilot Act of New York renders the employment of a licensed pilot obligatory upon vessels embraced in the act.[7] Vessels, whether coming in or going out of a harbor, are not, by the laws of Massachusetts, positively bound to employ a pilot.[8] Under the Pennsylvania act, which "obliges" vessels sailing to or from the port of Philadelphia to receive a pilot, under penalty and forfeiture of half pilotage, the taking of a pilot is optional.[9] The limits of the pilot ground are not fixed by any rule of law, but depend upon usage or custom which varies according to circumstances.[10]

1 The Panama, Deady, 27. And see *ante*, § 2.

2 The Panama, Deady, 27.

3 Ex parte, McNeil, 13 Wall. 241. See *ante*, § 2, and see Rev. Stats. secs. 4235, 4236.

4 Smith v. Swift, 8 Met. 332.

5 The George S. Wright, Deady, 391.

6 The Annapolis, Lush. 295.

7 The China, 7 Wall. 53.

8 Camp v. The Marcellus, 1 Cliff. 481.

9 Smith v. The Creole, 2 Wall. Jr. 495; Camp v. Marcellus, 1 Cliff. 492; Hunt v. Carlisle, 1 Gray, 237; Martin v. Hilton, 9 Met. 371; Nickerson v. Mason, 13 Wend. 64; Beckwith v. Baldwin, 12 Ala. 720; Hunt v. Mickey, 12 Met. 346; Commonwealth v. Ricketson, 5 Met. 412.

10 Hope v. The Dido, 2 Paine, 243; Lea v. Alexander, Ibid. 466.

§ 344. License of pilots. — The license under the State laws is to be signed by all the commissioners, or proof must be given that all were present.[1] Under the Oregon Pilot Act, a license signed by two of the three commissioners is not a valid instrument, unless it appears on the minutes of the board that the matter was acted on at a full meeting of the commissioners.[2] A pilot act providing that the commissioners "may appoint a secretary," and prescribing his duties, is mandatory; and parol evidence to prove the meeting and action of such commissioners is not admissible, when the act requires a record of the same to be made by the secretary.[3] A pilot's warrant as between third parties is conclusive evidence of proper appointment, and the possession and exhibition of it authorizes the master to treat the holder as a pilot.[4] The exhibition of the warrant to the master is a necessary part of the tender of services under an act which provides that the pilot "shall first show the master his warrant."[5] The pilot should have with him the evidence of his authority.[6]

1 Wass v. The California, 13 Int. Rev. Rec. 166.

2 Wass v. The California, 13 Int. Rev. Rec. 166.

3 The California, 1 Sawy. 596.

4 The Panama, Deady, 27.

5 The Eldridge, Deady, 176.

6 Hammond v. Blake, 10 Barn. & C. 424; Commonwealth v. Ricketson, 5 Met. 426.

§ 345. Duties of pilots.—Pilotage is a maritime service, though the pilot may live on shore; each act of pilotage is a maritime service.[1] It is the duty of a pilot to give all aid possible to a vessel in distress, and if they neglect to do so they forfeit their places.[2] If a pilot refuses to board a vessel, he is liable civilly and criminally.[3] A constant and familiar acquaintance with the towns, banks, trees, etc., and the relation of the channel to them, and of the snags, sand bars, sunken barges, and other dangers of the river, as they may arise, is essential to the character of a pilot on the navigable waters of the interior.[4] It is the duty of the pilot to select the time and place of coming to anchor,[5] and to superintend the mooring of the vessel,[6] and to take the measure in getting under way.[7]

1 The May Queen, 1 Sprague, 569; Hobart v. Drogan, 10 Pet. 108; The Alaska, 3 Ben. 392; The Robert J. Mercer, 1 Sprague, 284.

2 The Wave v. Hyer, 2 Paine, 150; Callagan v. Hallett, 1 Caines, 105.

3 Commissioners of Pilotage v. Low, R. M. Charl. 298.

4 Atlee v. Packet Co. 21 Wall. 389.

5 The George, 2 W. Rob. 386; The Agricola, 2 W. Rob. 10; The Massachusetts, 1 W. Rob. 371.

6 The Gipsey King, 2 W. Rob. 537. But see Griswold v. Sharpe, 2 Cal. 17.

7 The Peerless, Lush. 30.

§ 346. Authority of pilots.—A pilot in charge of a vessel is an officer within the act relative to endeavors to create a revolt, and the penalty attaches for refusal to obey his orders.[1] While on board, in the absence of the master, he has exclusive control of the navigation of the vessel; but if the master is present, his authority is not so far superseded by the pilot's power that he cannot interfere in case of gross ignorance, or palpable and dangerous mistake.[2] But the master may interpose his authority for the preservation of property in case of incompetency of the pilot.[3] A pilot is for many purposes considered a mariner or seaman.[4] The authority of a licensed pilot in securing a vessel in her berth is not paramount to that of her master; the acts of the pilot are regarded as done under direction and with the approval of the master.[5] He is master for the time being, and as there is a direct privity between him and the ship, the latter is liable in admiralty for damages caused by his acts.[6] He is answerable for the safety of the vessel, and in case of damage or loss will be released from liability only by showing that the causes producing it were beyond his control, arising from the act of God, or a *vis major* of the elements.[7]

1 U. S. v. Lynch, 2 N. Y. Leg. Obs. 51; U. S. v. Forbes, Crabbe, 561.

2 Camp v. The Marcellus, 1 Cliff. 482; The China, 7 Wall. 53; Snell v. Rich, 1 Johns. 305.

3 The Duke of Manchester, 2 W. Rob. 470; Shersby v. Hibbert, 6 Moore P. C. 90; The Christiana, 7 Notes of C. 2; Hammond v. Rodd, 7 Moore P. C. 160; The Joseph Harvey, 1 C. Rob. 257.

4 Hobart v. Drogan, 10 Pet. 108; The Anne, 1 Mason, 508; Ross v. Walker, 2 Wils. 264.

5 The Lotty, Olcott, 329; U. S. v. Forbes, Crabbe, 558; U. S. v. Lynch, 2 N. Y. Leg. Obs. 51.

6 Smith v. The Creole, 2 Wall. Jr. 485. See COLLISION.

7 The Washington v. The Saluda, 3 Law Int. & Rev. 249.

§ 347. Liability for negligence.—The pilot is considered as the master *pro hac vice*, and is answerable for any loss or injury sustained in the navigation of the vessel while under his charge.[1] Where, by the State statute,

the taking of a pilot is not compulsory, and only a forfeiture or penalty for the negligence is imposed, the vessel will be liable for damage caused by negligence of the pilot employed;[2] but it is otherwise if the taking of the pilot is compulsory.[3] Where the taking of the pilot is compulsory, but the statute contains no clause exempting the vessel from liability, the vessel will be liable for the pilot's mismanagement.[4] A river pilot is liable for damage caused by his want of information, as well as for his negligence.[5] A pilot was held in fault for hugging the shore on a dark night, where he knew a mill and boom of a riparian proprietor were.[6] Pilot boats, equally with other vessels, are guilty of culpable negligence in sailing in the night time without a competent lookout, properly stationed.[7] Where a pilot had not made a trip over that part of the river for fifteen months previous to the one which he was now making, and from ignorance of its existence ran his vessel against a pier built in the river since he had last navigated it, he was held in fault for want of knowledge.[8]

1 Camp *v.* The Marcellus, 1 Cliff. 493; Yates *v.* Brown, 8 Pick. 23; Haggett *v.* Montgomery, 5 Bos. & P. 466; Heridia *v.* Ayres, 12 Pick. 334; Attorney-General *v.* Case, 2 Price, 302; Slade *v.* State, 2 Carter, 33.

2 Smith *v.* The Creole, 2 Wall. Jr. 514; Bowcher *v.* Noldstrom, 1 Taunt. 568; The Merrimac, 14 Wall. 203; Martin *v.* Hilton, 9 Met. 371; Hunt *v.* Carlisle, 1 Gray, 237; The China, 7 Wall. 62; Attorney-General *v.* Case, 3 Price, 302; The Carolus, 2 Curt. 69.

3 The China, 7 Wall. 62; Carruthers *v.* Sydebotham, 4 Maule & S. 77; The Maria, 1 W. Rob. 95; Smith *v.* The Creole, 2 Wall. Jr. 517; The Carolus, 2 Curt. 69; The Neptune Second, 1 Dods. 467.

4 The China, 7 Wall. 59; The Maria, 1 W. Rob. 95. And see COLLISION.

5 Atlee *v.* Packet Co. 21 Wall. 389. See *ante*, § 337.

6 Atlee *v.* Packet Co. 21 Wall. 389.

7 The Blossom, Olcott, 188.

8 Atlee *v.* The Packet Co. 21 Wall. 389.

§ 348. Compensation of pilots.—The pilot laws of a State have effect beyond the boundaries of a State to fix the compensation of pilots.[1] Where a pilot boarded a ship some thirty miles from Barnegat, but did not render his services until Sandy Hook hove in sight, he was entitled only to in-shore pilotage.[2] A Boston pilot is not entitled to full fees upon a tender of services to a vessel which crosses the harbor of Boston, on her way to a neighboring port to which she is bound.[3] There is no settled rule which precludes a master from recovering for services rendered in the capacity of a pilot,[4] nor does it impair the lien of a pilot for wages that, when the vessel

was in port, the pilot was recognized and officiated as master.[5] Pilotage is a necessary expense on a voyage, and if the master pays it he represents the claimants, and the lien continues on the money produced by a sale of the vessel.[6] To give a lien, the contract must be made by some person in the employment of the owner duly authorized to make the contract.[7] In order to charge a person with liability as agent under the New York pilotage law, it is necessary to show that he had some connection with the vessel.[8] United States courts have concurrent jurisdiction with State courts over actions for pilots' wages.[9] Pilotage services are not so exclusively of a maritime character that common-law courts do not take cognizance of suits for such services, even when performed on the high seas.[10]

1 The Nevada, 7 Ben. 386; Cisco v. Roberts, 36 N. Y. 292.

2 The Alaska, 3 Ben. 391.

3 Nash v. The Thebes, 12 Hunt's Mer. Mag. 82.

4 Bissell v. Mepham, 1 Woolw. 225.

5 Logan v. The Æolian, 1 Bond, 267.

6 Gardner v. The New Jersey, 1 Pet. Adm. 227; The Anne, 1 Mason, 508.

7 Leitch v. The George Law, 6 Amer. Law Reg. 388; The Robert J. Mercer, 1 Sprague, 284. See SALVAGE.

8 Mason v. Ingraham, 5 Ben. 81.

9 Hobart v. Drogan, 10 Pet. 108; The Anne, 1 Mason, 508; Dexter v. The Richmond, 4 Law Rep. 20; The Wave, Blatchf. & H. 235; The Nelson, 1 Hagg. Adm. 169; The Joseph Harvey, 1 C. Rob. 257. But see Gibbons v. Ogden, 9 Wheat. 207; The Wave v. Hyer, 2 Paine, 131.

10 The Wave v. Hyer, 2 Paine, 142; Callagan v. Hallett, 1 Caines, 104; Shepherd v. Mitchell, 10 Johns. 112.

§ 349. Half pilotage.—The master may decline the services of the pilot, but in that event he must pay the legal fees.[1] A vessel that is within pilotage ground, but disabled so that she cannot get into port without steam, is bound to accept the offer of a pilot, or pay his fee.[2] A pilot who first offers his services, if rejected, is entitled to his fee.[3] Hailing a vessel, when the hail is heard on board, or might have been heard if the officers and crew had been on duty, is "a valid offer of his services."[4] When the State statute gives half pilotage as a compensation for tender and refusal of services, it is a lien upon the vessel enforceable in admiralty.[5] Under the laws of New York, when a vessel in the port of New York has entered upon a voyage which will carry her through Hell Gate, she is bound to employ the first pilot who tenders his services, or, in case of refusal to pay half pilotage, although the voyage through Hell Gate is not completed.[6] The act

is applicable to vessels bound to New York, to whom the tender of service was made as far east as Sand's Point.[7] A vessel bound to New York, refusing to take a pilot and pay off-shore pilotage, is not excused by the fact of taking on another pilot and paying in-shore pilotage.[8] The repeal of an act will not defeat the right to half pilotage allowed by a prior act when the right became vested.[9] The half pilotage provided for in the State statutes, on refusal of the master to accept services when tendered, is enforceable in admiralty.[10] The law does not impose a penalty, but implies a debt, which may be recovered by an action of contract.[11] If a ship neglects to take a pilot that offers the owners will be answerable in damages to shippers or others for any loss which may happen by reason of such neglect or refusal.[12] By the Massachusetts statute, pilots are entitled to fees though their services are refused, but the tender and refusal creates only a personal liability.[13]

1 Camp *v.* The Marcellus, 1 Cliff. 492; Hunt *v.* Carlisle, 1 Gray, 237; Martin *v.* Hilton, 9 Met. 371; Nickerson *v.* Mason, 13 Wend. 64; Commonwealth *v.* Ricketson, 5 Met. 412; Beckwith *v.* Baldwin, 12 Ala. 720; Smith *v.* Swift, 8 Met. 329.

2 Flanders *v.* Tripp, 2 Low. 15.

3 Flanders *v.* Tripp, 2 Low. 16; Commonwealth *v.* Ricketson, 5 Met. 412; The America, 2 Am. Law Rev. 458; Ex parte McNiel, 13 Wall. 236.

4 Commonwealth *v.* Ricketson, 5 Met. 412. But see Peake *v.* Carrington, 2 Brod. & B. 399.

5 The California, 1 Sawy. 468, distinguishing The Wave, 2 Paine, 131; S. C. Blatchf. & H. 235; The R. J. Mercer, 1 Sprague, 284; The Pacific, 1 Blatch. 569; The America, 2 Am. Law Rev. 458.

6 Bell *v.* The Traveler, 16 Int. Rev. Rec. 198; 6 Ben. 280.

7 Horton *v.* Smith, 6 Ben. 264.

8 The Nevada, 7 Ben. 336; Cisco *v.* Roberts, 36 N. Y. 292.

9 Steamship Co. *v.* Joliffe, 2 Wall. 450.

10 Horton *v.* Smith, 6 Ben. 264; The Traveller, 6 Ben. 280; Peterson *v.* Walsh, 1 Daly, 185; The California, 1 Sawy. 467; The George S. Wright, Deady, 591; Benton *v.* McNeil, 5 Ben. 76; Steamship Co. *v.* Joliffe, 2 Wall. 450; Ex parte McNiel, 13 Wall. 242; The America, 1 Low. 177; Winslow *v.* Prince, 6 Cush. 368; Commonwealth *v.* Ricketson, 5 Met. 412; The Alaska, 3 Ben. 391; The Marcellus, 1 Cliff. 493; Hunt *v.* Carlisle, 1 Gray, 237; The Robert J. Mercer, 1 Sprague, 284; The George Law, 6 Am. Law Reg. 368.

11 The America, 1 Low. 177; Hunt *v.* Carlisle, 1 Gray, 257; Commonwealth *v.* Ricketson, 5 Met. 412; Hunt *v.* Mickey, 12 Met. 346; Winslow *v.* Prince, 6 Cush. 368.

12 McMillan *v.* Union Ins. Co. 1 Rice, 248; Keeler *v.* Fireman's Ins. Co. 3 Hill, 250.

13 The Robert J. Mercer, 1 Sprague, 284.

CHAPTER XVII.

WHARFAGE.

§ 350. Generally.
§ 351. Rights, duties, and obligations.
§ 352. Compensation.

§ 350. Generally.—Wharves are structures made to facilitate and aid navigation, and are generally regulated by city or town ordinances.[1] A city being in possession of a wharf, and exercising an exclusive supervision over it, and receiving tolls for its use, is bound to keep it in repair.[2] The city is held to the utmost care of the wharf, and the owners of the vessel only to that common prudence which would keep them clear of a manifest peril.[3] City ordinances concerning vessels may be read in evidence, but they are binding only as police regulations.[4] According to the custom of the port in Philadelphia, a vessel which has legally occupied an outer berth has the right to claim the next inner berth covered by her on its becoming vacant.[5] Where a vessel hauled into the dock in the harbor of Charlestown on a Sunday, notwithstanding the law of the State prohibiting work on that day, damages for injuries caused by a defect in the dock may be recovered, whether they were caused on Sunday or another day.[6] Every vessel has a license to use for her safety or convenience any public wharf on navigable waters, upon paying reasonable wharfage.[7] It is the duty of the ship's master, before placing his vessel in a berth, to ascertain whether the depth of water is sufficient for the draft of his vessel.[8] In the absence of notice of danger, a vessel coming to a wharf may go to any part of the wharf.[9] While a vessel occupies a berth at a wharf, the right to occupy that berth cannot be claimed by any other vessel; but where a berth is vacant, it may, with the owner's consent, be occupied by any vessel.[10] Wharves are but improvements or extensions of the shore, and injuries done to them do not constitute maritime torts cognizable in admiralty.[11] The possession of a wharf under color of title is sufficient to put a party obstructing its use on proof of a better title.[12]

1 Atlee v. The Packet Co. 21 Wall. 389.
2 Pittsburgh v. Grier, 22 Pa. St. 54.

3 Pittsburgh v. Grier, 22 Pa. St. 54; Parnaby v. Lancaster C. Co. 11 Adol. & E. 223; Mersey Docks v. Penshallow, 7 Hurl. & W. 329; Gibbs v. Trustees of Liverpool Docks, 3 Ibid. 164; Mersey Docks v. Gibbs, 11 H. L. Cas. 686.

4 The Palmetto, 1 Biss. 143; The New York v. Rea, 18 How. 223.

5 Sawyer v. Oakman, 1 Low. 134; S. C. 7 Blatchf. 290. And see Bosworth v. Swansey, 10 Met. 363.

6 Sawyer v. Oakman, 1 Low. 134. And see Bosworth v. Swansey, 10 Met. 363.

7 The Kate Tremaine, 5 Ben. 62; Heckers v. N. Y. Balance Dock Co. 13 How. Pr. 551.

8 Nelson v. Phœnix Chem. Works, 7 Ben. 37.

9 Pittsburgh v. Grier, 22 Pa. St. 54.

10 Lincoln v. The Volusia, 4 Pa. Law J. 65.

11 The Ottawa, 1 Brown Adm. 357. And see the Sylph, Law Rep. 2 Ad. & Ec. 24; The Excelsior, Ibid. 268. The same rule applies to bridges: The Rock Island Bridge, 6 Wall. 213.

12 Linthicum v. Ray, 9 Wall. 241.

§ 351. Rights, duties, and obligations.—Wharfingers may occupy their wharves by their own vessels to the exclusion of vessels of others.[1] It is their duty to give information as to the inequalities in the surface of the bottom, when material to the safety of the vessel;[2] but he is not bound to maintain a depth of water in the berth at his wharf sufficient for all vessels at all tides.[3] The owners of a dock or wharf are liable for damages arising from defects, to a person lawfully using the same in the course of business and in the exercise of due care;[4] as by defects in the bottom known to the dock owners, but not to the master of the vessel,[5] and a direction to take a certain berth is not sufficient notification of the depth of the water.[6] The owner of a private wharf is liable in the same way as the owner of a public wharf, where the vessel is moored at his wharf with his assent, under agreement to pay wharfage.[7] Although the hauling into a berth at a wharf on Sunday is an illegal act under a State statute, yet, if damage be suffered on that day, through the wrongful act or omission of another on that day, the owner of the vessel may recover for such damage.[8] The lessee of a wharf has no claim to indemnity for the loss of its trade.[9]

1 Lincoln v. The Volusia, 3 Wall. Jr. 375.

2 Nelson v. Phœnix Chem. Works, 7 Ben. 39; Sawyer v. Oakman, 7 Blatchf. 290; S. C. 1 Low. 34.

3 Nelson v. Phœnix Chem. Works, 7 Ben. 39.

4 Sawyer v. Oakman, 7 Blatchf. 293; 1 Low. 136, 138; Philadelphia W. & B. R. R. Co. v. Philadelphia, &c. Tow-Boat Co. 23 How. 209, distinguishing The Ottawa, 1 Brown Adm. 360; Parnaby v. Lancaster Canal Co. 11 Adol. & E. 223; Mersey Docks Co. v. Gibbs, Law Rep. 1 H. L. Cas. 93;

Carleton v. Franconia Iron & S. Co. 99 Mass. 116; The Metropolis, 1 Pars. on Sh. 397, note. And see Railroad Co. v. Hanning, 15 Wall. 649.

5 Sawyer v. Oakman, 1 Low. 134; 7 Blatchf. 290.

6 Nelson v. Phœnix Chem. Works, 7 Ben. 37.

7 Wendell v. Baxter, 12 Gray, 494.

8 Sawyer v. Oakman, 1 Low. 134; 7 Blatchf. 305; The Metropolis, 1 Pars. on Sh. 397, note; Powhattan S. Co. v. Appomattox R. R. Co. 24 How. 247; 14 Wall. 503.

9 Marshall v. Vicksburg, 15 Wall. 146.

§ 352. Compensation.—Dockage in a dry dock is in the nature of rent, and subject to the will of the proprietor of the dock,[1] and a corporation may charge and collect wharfage.[2] Under the statute of New York, fixing the rates of wharfage to be paid, a vessel which makes fast to two distinct landing places must pay accordingly.[3] If a vessel leaves the wharf without paying the wharfage due, she becomes liable, under the statute of New York, to pay double the rates established by the statute.[4] It is not a penalty, and a lien attaches therefor.[5] In general, a wharfinger has a lien on a foreign vessel for wharfage, but not against a domestic vessel.[6] The lien is lost by departure of the ship from its moorings, but it revives when the vessel was secretly removed and subsequently brought back, without fraud or force.[7] Claims for wharfage, arising out of either an express or implied contract, are cognizable in admiralty,[8] and not the less so because the amount may be fixed by State statute.[9] The owner of a chartered vessel is not liable for wharfage.[10] Where an express contract is made the court will not give a priority of claim over a bottomry previously attached.[11]

1 Ives v. The Buckeye State, Newb. 69.

2 Packet Co. v. The Keokuk, 95 U. S. 80; Cannon v. New Orleans, 20 Wall. 577.

3 The Virginia Rulon, 13 Blatchf. 519.

4 The Virginia Rulon, 13 Blatchf. 519.

5 The Virginia Rulon, 13 Blatchf. 519.

6 Russell v. The Asa R. Swift, Newb. 553; Johnson v. The McDonough, Gilp. 101; Ex parte Lewis, 2 Gall. 483.

7 Ex parte Lewis, 2 Gall. 483; Johnson v. The McDonough, Gilp. 101; Russell v. The Asa R. Swift, Newb. 553.

8 Ex parte Easton, 95 U. S. 68; Ex parte Lewis, 2 Gall. 483; The Phebe, 1 Ware, 360; Johnson v. The McDonough, Gilp. 101; Ives v. The Buckeye State, Newb. 69; Russell v. The Asa R. Swift, Ibid. 553; The Virginia Rulon, 13 Blatchf. 519.

9 Banta v. McNeil, 5 Ben. 76; Hobart v. Drogan, 10 Pet. 108; The Virginia Rulon, 13 Blatchf. 519. But see Delaware Rev. Storage Co. v. The Thomas, 16 Int. Rev. Rec. 147.

10 Philadelphia v. Naglee, 1 Ashm. 37.

11 Ex parte Lewis, 2 Gall. 485; Hutton v. Bragg, 7 Taunt. 14; S. C. 2 Marsh. 339.

§ 404. Apportionment of damages.
§ 405. Lien for damages.
§ 406. Costs.

§ 353. Definition.—Collision, in the nautical acceptation of that term, imports the impinging of vessels together while in the act of being navigated; but the term applies equally to cases where a vessel is run foul of, when entirely stationary, or when brought in contact by swinging at her anchor.[1] An injury sustained by being violently rubbed against by a vessel lying alongside, in consequence of a collision by a third vessel, may be compensated for under the general head of collision.[2] Two things must concur for an act of collision: it must be a collision by the act of one party, and no want of ordinary care to avoid it on the part of the other.[3]

1 The Moxey, Abb. Adm. 73.

2 The Moxey, Abb. Adm. 73.

3 The Pilot, 1 Biss. 164; Sills v. Brown, 9 Car. & P. 601.

§ 354. Rights, by what law regulated.—The rights of the parties in an action for a collision depend on the law of the place where the collision occurred;[1] but if a collision takes place on the high seas between vessels of different nationalities, the rules of the maritime law are to determine which was in fault.[2] Sailing rules and regulations prescribed by law furnish paramount rules of decision whenever they are applicable;[3] but local usages are but little regarded,[4] as vessels are not bound by the regulations of a foreign country.[5] When the local law is applied it is because of the peculiar circumstances of the case, and the nature of the law.[6] State statutes requiring the exhibition of lights in certain circumstances, although valid as internal police regulations, are not applicable to vessels engaged in general commerce, and a foreign vessel which has a light within the requirements of the admiralty rule is not in fault for not showing a light conformable to the local statute.[7] A pilot rule of supervising inspectors, in so far as it requires a port helm in all cases, is inconsistent with article 14 of the international navigation laws adopted by Congress.[8] Under a State statute a vessel whose jibboom is standing contrary to law must be held liable for collision caused by it.[9] In sending a vessel to any particular port, the owner elects to submit to the lawful regulations established at that port, and that his vessel shall be responsible for a collision with another vessel engaged in lawful navigation.[10] A city ordinance respecting the place where a vessel might be at anchor in a har-

bor, the time she might remain, and what light she must show, is valid.[11] Where a custom requires the boat running against the current, on entering a narrow channel and meeting another boat, to reverse and stop, it will be enforced in admiralty.[12] A vessel lying at a wharf must have her anchor out of the way of passing vessels; and if she allows it to hang so that it sinks a colliding vessel, she is in fault.[13]

1 Smith *v.* Condry, 1 How. 28; The Peerless, Lush. 30; The China, 7 Wall. 64; The Eagle, 8 Wall. 21; The Scotia, 7 Blatchf. 321. And see The Vernon, 1 W. Rob. 319; Gen. St. N. Co. *v.* Guillon, 11 Mees. & W. 877; The Annapolis, Lush. 295; The Dumfries, Swabey, 63; The Zollverein, Ibid. 96; The Saxonia, Lush. 410; The Chancellor, 14 Moore P. C. 202; 4 L. T. N. S. 627; The Belle, 1 Ben. 317; Cope *v.* Doherty, 4 Kay & J. 367; 2 De Gex & J. 626.

2 The Belle, 1 Ben. 320; The Scotia, 14 Wall. 170; 7 Blatchf. 326; The Chancellor, 4 Ben. 153; The Saxonia, Lush. 410; The Dunfries, Swabey, 63; The Zollverein, Swabey, 96; Williams *v.* Gutch, 14 Moore P. C. 202, explaining The Cleadon, Lush. 158; 4 L. T. N. S. 157. But see The New Ed. *v.* Gustow, Holt. R. R. 28; The Fyenoord, Swabey, 374.

3 The City of Washington, 92 U. S. 31.

4 Wheeler *v.* The Eastern State, 2 Curt. 141; The Clement, 2 Curt. 363; The Lion, 1 Sprague, 40; The E. C. Scranton, 3 Blatchf. 50; 4 Ben. 127; The Merrimac, 14 Wall. 203; The Carolus, 2 Curt. 69; The Topaze, Holt. R. R. 165; The Western Metropolis, 7 Blatchf. 214.

5 Don *v.* Lipman, 5 Clark & F. 1; The Vernon, 1 W. Rob. 319.

6 The Avon, 1 Brown Adm. 182, explaining Smith *v.* Condry, 1 How. 28.

7 The New York *v.* Rea, 18 How. 223; Snow *v.* Hill, 20 How. 543; Railroad Co. *v.* Fuller, 17 Wall. 568. But compare, *contra*, The James Gray *v.* The John Frazer, 21 How. 184. And see The E. C. Scranton, 3 Blatchf. 30; Rathbun *v.* Payne, 19 Wend. 399; Fitch *v.* Livingston, 4 Sandf. 492, 712; The Santa Claus, Olcott, 428; 1 Blatchf. 370; Halderman *v.* Beckwith, 4 McLean, 286; but they do not control foreign vessels—Halderman *v.* Beckwith, 4 McLean, 286; The New York *v.* Rea, 18 How. 223; The Alert, 1 Dods. 236; The Christiana, 7 Moore P. C. 160; The Borussia, Swabey, 94.

8 The James Gray *v.* The John Frazer, 21 How. 184; The Atlas, 4 Ben. 27; 10 Blatchf. 459.

9 The China, 7 Wall. 70; The Carolus, 2 Curt. 269; The Julia M. Hallock, 1 Sprague, 539; Bussy *v.* Donaldson, 4 Dall. 206; Yates *v.* Brown, 8 Pick. 23; Williamson *v.* Price, 4 Mart. N. S. 399; Dennison *v.* Seymour, 9 Wend. 1; Smith *v.* Condry, 1 How. 28; The Lotty, Olcott, 329; Smith *v.* The Creole, 2 Wall. Jr. 514; The Rescue, 2 Sprague, 16.

10 The Clover, 1 Low. 345; The Baltic, 2 Ben. 399; The Bedford, 5 Blatchf. 200; The James Gray *v.* The Frazer, 21 How. 184.

11 McCoy *v.* The Currituck, 2 Hughes, 91.

12 The Clover, 1 Low. 345.

13 Phœnix Ins. Co. *v.* The Atlas, 4 Ben. 27; S. C. 3 Am. L. T. 89; The Palmetto, 1 Biss. 140; The B. S. Sheppard, 1 Biss. 225.

§ 355. Precautions to avoid collisions.—A vessel about to get under way should notify a vessel at anchor, so near to her that there is danger of collision, of her intention to get under way.[1] A vessel entering a harbor is bound to exercise great care and diligence.[2] It is the duty of every master, whether in an intense fog or great darkness, to exercise the utmost vigilance, and secure the best chance of avoiding accidents, even should his precautions occasion delay.[3] Vessels must be navigated with all reasonable precaution, consistent with the regulations, against the happening of accidents,[4] and with all reasonable preparation to extenuate the consequences of accidents when they occur, as against dragging.[5] They are bound to use, with reasonable promptitude and skill, all the means in their power to avoid a threatened collision;[6] such means depending on the circumstances of the case.[7] The safeguards against danger, in order to be effectual, must be seasonably employed.[8] It is enough that the precautions are reasonable, under the circumstances; the highest degree of caution is not needed.[9] Where practicable, a vessel is bound to take the necessary precautions for avoiding a collision, although the other vessel is acting wrongfully in not giving way in time.[10] Every precaution must be taken by the injured vessel, after a collision, to make the loss as light as possible.[11] Vigilance is required of those having the conduct of both vessels,[12] but a stricter degree of vigilance is required of steamers.[13] A vessel about to go in stays at night should carefully observe whether there are vessels near which may be endangered.[14]

1 O'Neil *v.* Sears, 2 Sprague, 52.

2 Culbertson *v.* Shaw, 18 How. 584; Ward *v.* The Dousman, 6 McLean, 231.

3 The Chancellor, 4 Ben. 161; The Itinerant, 2 W. Rob. 236.

4 The Louisiana, 2 Ben. 380; Lane *v.* The A. Denike, 3 Cliff. 117.

5 The Lincoln, 1 Low. 48; The Lion, 1 Sprague, 40.

6 The New Jersey, Olcott, 415, 444; The New Champion, Abb. Adm. 206; The Neptune, Olcott, 483.

7 The Louisana, 2 Ben. 380; The Hannah Park *v.* The Lena, Holt. R. R. 315; Lane *v.* The A. Denike, 3 Cliff. 117.

8 The W. H. Clark, 5 Biss. 303; The Johnson, 9 Wall. 146; The Carroll, 8 Wall. 302; The Vanderbilt, 6 Wall. 225; Killam *v.* The Eri, 3 Cliff. 456.

9 The Colorado, 1 Brown Adm. 403; The Grace Girdler, 7 Wall. 196; Union S. S. Co. *v.* New York &c. Co. 24 How. 307; The Washington, 14 How. 532; The Morning Light, 2 Wall. 550.

10 St. John *v.* Paine, 10 How. 557; Haney *v.* Baltimore S. P. Co. 23 How.; The Ann Caroline, 2 Wall. 538; Foster *v.* The Miranda, Newb. 227; 6 McLean, 221; The Santa Claus, Olcott, 428; The Vanderbilt, Abb.

Adm. 261; Allen v. Mackay, 1 Sprague, 212; The Hope, 1 W. Rob. 154; The Friends, 1 W. Rob. 478; The Shannon, 2 Hagg. Adm. 173; The Lady Anne, 1 Eng. L. & E. 670; The Niagara, 17 Law Rep. 338; The St. John v. The Mary Bannatyne, 18 Law Rep. 628; Moore v. Moss, 14 Ill. 106; Hawkins v. Dutchess S. Co. 2 Wend. 452. But see The Oregon v. Rocca, 18 How. 570; Crockett v. Newton, 18 How. 581; Wheeler v. The Eastern State, 2 Curt. 141; The Sylph, 2 Spinks, Ec. & Ad. 75.

11 The S. F. Gale, Newb. 232; Newton v. Stebbins, 10 How. 586; St. John v. Paine, 10 How. 557; The Cynosure, 1 Sprague, 88; Foster v. The Miranda, 6 McLean, 227.

12 Lane v. The A. Denike, 3 Cliff. 117; The Alma, Holt. R. R. 259.

13 McGrew v. The Melnotte, 1 Bond, 453.

14 The Flora, Holt. R. R. 114; The Bolderaa, Ibid. 55; The Oscar, Id. 231.

§ 356. Duty and obligations of steamers.—A steamer going on her customary route should keep in her usual track.[1] If out of her proper course, in a dense fog, moving in the track of vessels, she will be held liable for a collision.[2] Neither rain, darkness, nor the absence of lights on the sail vessel, nor the fact that the steamer was well manned, furnished, and conducted with care, will excuse her if out of her usual track.[3] When moving in crowded or narrow waters, steamers should exercise great caution and vigilance.[4] In thoroughfares when the darkness is such that it is impossible or difficult to see approaching vessels, it is their duty "to slow," or even stop, or back their engines, according to circumstances; and the principle of the rule may be applied, in a qualified sense, to sail vessels.[5] So, in coming to anchor on a dark night, they should ease their engines, and proceed with great caution.[6] A steam vessel entering a short and narrow artificial channel, when liable to meet tugs with tows coming from the other end, must exercise caution in the way she enters and proceeds, an l keep herself, as to course, rate, and speed, entirely under control.[7] When approaching a tug and her tows, a steamer is bound to move with caution.[8] Two steamers approaching, should both stop their engines in view of danger till the course and direction of each is clearly ascertained.[9] Where one steamer is going with the tide and another against it, and one should be required to stop, it is the duty of the one going against the tide to do so.[10] The obligations and duties of steam vessels are rigidly enforced.[11] The want of a pilot on a steamer navigating a narrow channel is *prima facie* a fault.[12]

1 The Bay State, 3 Blatchf. 48; The Vanderbilt, 6 Wall. 225; N. Y. & V. S. S. Co. v. Calderwood, 19 How. 241.

2 McKibbin v. The C. Vanderbilt, 2 Int. Rev. Rec. 62.

3 Pope v. The R. B. Forbes, 1 Cliff. 343; Williams v. Hill, 19 How. 246.

4 The Alleghany, 9 Wall. 522; The Corsica, Ibid. 630; The City of Paris, Ibid. 634.

5 The Morning Light, 2 Wall. 559; The Rose, 7 Jur. 381; The Virgil, 2 W. Rob. 201; 7 Jur. 1174; The Leo, 11 Blatchf. 225.

6 The Ceres, Swabey, 250.

7 The Alleghany, 9 Wall. 522; 1 Biss. 297; 2 Biss. 33.

8 The Syracuse, 9 Wall. 676; The New Jersey, Olcott, 415; The Rose, 2 W. Rob. 1; 7 Jur. 381; The Iron Duke, Holt. R. R. 227; The Graaf Von Rechteren, Ibid. 247.

9 Waring *v.* Clarke, 5 How. 502; The James Watt, 2 W. Rob. 270; 8 Jur. 220.

10 The Galatea, 92 U. S. 439.

11 The Atlantic, Newb. 154; Ward *v.* The Ogdensburgh, 5 McLean, 638; The Leopard, 2 Ware, (Dav.) 193; The Europa, Brown. & L. 87; 2 Eng. L. & E. 557; The Genessee Chief, 12 How. 443; The Rose, 2 W. Rob. 1; 7 Jur. 381; The Virgil, 2 W. Rob. 201; 7 Jur. 1174.

12 The Milwaukee, 1 Brown Adm. 313.

§ 357. Steamers to avoid sail vessels.—The duty to avoid a collision is primarily on the steamer.[1] A steamer is bound to use, effectively and promptly, the extraordinary means she possesses, to avoid collision with a sailing vessel, and is liable for the consequences of a collision occurring through her neglect to use them.[2] A steamer approaching a sail vessel is required to exercise necessary precautions to avoid collision,[3] to take timely means, and not press upon her, so as to put her in jeopardy or alarm,[4] from the time the vessel is in sight,[5] without waiting for any correspondent exertions on the part of the sailing vessel.[6] Great caution is required when the course of the sailing vessel is uncertain.[7] When a vessel is drifting with the current, even in the usual track of steamboats, it is their duty to avoid her.[8] So, a steamer is bound to avoid a vessel at anchor:[9] nothing will excuse her for a collision with an anchored vessel or one sailing in the thoroughfare out of the usual track of the steamer.[10] Where the steamer uses the best means in her power to avoid a collision, she is not liable.[11]

1 Haney *v.* The Louisiana, Taney, 602; The Kentucky, 4 Blatchf. 325; The Fannie, 11 Wall. 238; The Fashion *v.* Wards, 6 McLean, 176; St. John *v.* Paine, 10 How. 557; Baker *v.* The City of New York, 1 Cliff. 75; The Pacific, Newb. 31.

2 The Bay State, 11 N. Y. Leg. Obs. 297; Butterfield *v.* Boyd, 18 How. Pr. 527; Carpenter *v.* The Island City, 2 Int. Rev. Rec. 109; The Sampson, 3 Am. L. Reg. 337; Twibell *v.* The Keystone, 9 N. Y. Leg Obs. 289; The Jamaica St. Ferryboat Collision, 11 N. Y. Leg. Obs. 242; The Iola, Ibid. 263; The Empire State, 12 Ibid. 259; The Wenona, 4 Ben. 219; The Nichols, 7 Wall. 656; The Carroll, 8 Wall. 302; The Oregon *v.* Rocca, 18 How. 570.

3 New York &c. Co. *v.* Rumball, 21 How. 384; St. John *v.* Paine, 10 How. 557; The Oregon *v.* Rocca, 18 How. 570; The New Jersey, Olcott, 419; Lowry *v.* The Portland, 1 Law Rep. 313; The Hope, 1 W. Rob. 157.

4 The Narragansett, Olcott, 249; The Shannon, 2 Hagg. Adm. 173; 7 Jur. 380; 1 W. Rob. 463; The Harriet, 1 W. Rob. 182; The Perth, 3 Hagg. Adm. 414; The New Jersey, Olcott, 419.

5 The Carroll, 8 Wall. 302.

6 The New Jersey, Olcott, 419; The Shannon, 2 Hagg. Adm. 173; 7 Jur. 380; 1 W. Rob. 463; The Perth, 3 Hagg. Adm. 414.

7 The Louisiana *v.* Fisher, 21 How. 6; The James Watt, 2 W. Robb. 270; 8 Jur. 320; Peck *v.* Sanderson, 17 How. 178; The Birkenhead, 3 W. Rob. 75.

8 Fretz *v.* Bull, 12 How. 466; Saune *v.* Towne, 9 La. 428; Pearce *v.* Page, 24 How. 228; The Fashion *v.* Ward, 6 McLean, 152; Newb. 8; Ward *v.* The Dousman, 6 McLean, 231; Butterfield *v.* Boyd, 4 Blatchf. 356.

9 Waring *v.* Clarke, 5 How. 441; The Girolamo, 3 Hagg. Adm. 169; The Eolides, 3 Hagg. Adm. 367; The Baron Holberg, 3 Hagg. Adm. 244.

10 Amoskeag M. Co. *v.* The John Adams, 1 Cliff. 413; New York, &c. Co. *v.* Calderwood, 19 How. 241.

11 The Postboy, 10 N. Y. Leg. Obs. 65.

§ 358. Rate of speed of steamers.—The law will not justify a steamer in going at a high rate of speed in a fog, or in the dark, when the property and lives of other persons are endangered thereby.[1] They are required to go at a moderate rate of speed;[2] such a rate as will place her headway under such easy and ready command that she can be stopped within such distance as other vessels can be seen from her.[3] Going at too great a rate of speed is deemed a fault.[4] The maritime law imposes on a steamer in a fog the duty to slacken speed to the lowest point consistent with maintaining steerway.[5] She must reduce her speed to a moderate rate, or abide the consequences.[6] It is no excuse for excessive speed that the steamer could not otherwise fulfill a mail contract.[7] The rule that there must not be too much speed in a fog has been applied to sailing vessels, under varying circumstances, depending on the particular facts of the case.[8] Excess of speed on a steamer is a question of fact, in determining which, the locality and hour, state of the weather, and all the circumstances, are to be fully considered.[9] There are general rules for the government of vessels as to their rate of speed in a fog, based upon the uniformity of principles and leading to uniformity of decision.[10] Steamers running into a harbor, or through a common thoroughfare of vessels, will be held chargeable with the consequences of collisions when kept at high speed during the night, or during weather so thick that objects cannot be discerned at a distance sufficient to avoid them.[11] It is fault in a tug to come into a narrow channel leading into a basin at too great speed.[12] A steamer was faultless which was running nine miles an hour, with no abatement of speed.

Holt R. R. 203; The Fanny Buck, Idem. 193; The Sylph, 2 Spinks, 55; The James Watt, 2 W. Rob. 270; The Ligo, 2 Hagg. Adm. 356; The Bolderaa, Holt R. R. 205; Nelson *v.* Leland, 22 How. 48; The Hermann, 4 Blatchf. 441; The Northern Indiana, 3 Blatchf. 92; 16 Law. Rep. 433; The Berkenhead, 3 W. Rob. 75; The Empire State, 2 Biss. 216.

2 The Louisiana, 2 Ben. 378; The James Watt, 2 W. Rob. 270; The Northern Indiana, 3 Blatch. 92; 6 Law Rep. N. S. 433; The Franconia, 4 Ben. 181; The Hammonia, 4 Ben. 515; 11 Blatchf. 413; The Titian, 6 Ben. 346.

3 Dodge *v.* The Illinois, 5 Blatchf. 256; 2 Int. Rev. Rec. 77; The Illinois, 5 Blatchf. 256; 2 Int. Rev. Rec. 77.

4 The Hypodame, 6 Wall. 225, distinguishing The Osprey, 2 Wall. Jr. 268. And see The Perth, 3 Hagg. Adm. 414; The Frank Moffat, 11 Ch. L. N. 115.

5 The Northern Indiana, 3 Blatchf. 99; The Genessee Chief, 12 How. 443; The Perth, 3 Hagg. Adm. 414; The Iron Duke, 2 W. Rob. 377; The Rose, 2 W. Rob. 1; St. John *v.* Paine, 10 How. 557.

6 The Hansa, 2 Ben. 299; S. C. 7 Blatchf. 288; The Fashion *v.* Ward, 5 McLean, 176; Newton *v.* Stebbins, 10 How. 586; The Rose, 2 W. Rob. 1.

7 The Free State, 1 Brown Adm. 262; The Rob Roy, 3 W. Rob. 190.

8 The Free State, 1 Brown Adm. 251; The Sunnyside, Idem. 227.

9 The Free State, 1 Brown Adm. 266; The New York, 18 How. 223; McCready *v.* Goldsmith, 18 How. 89; The St. Charles, 19 How. 108; The Louisiana, 21 How. 1; 2 Ben. 377; Nelson *v.* Leland, 22 How. 48; The City of Paris, 9 Wall. 634; The Bay State, Abb. Adm. 235; The Electra, 1 Ben. 282; The Northern Indiana, 3 Blatchf. 92; The A. Rossiter, Newb. 225; The Buffalo, Idem. 115; The James Watt, 2 W. Rob. 271; The Berkenhead, Idem. 75; The Cognac, Holt, Ru. of Rd. 143; The Concordia, Idem. 142; The Sunnyside, 6 Am. L. T. 277.

10 The Free State, 1 Brown Adm. 265; The Cognac, Holt's R. R. 133; The Concordia, Idem. 142; The Mary Sandford, 3 Ben. 100; The Wenona, 8 Blatch. 499; The America, 3 Ben. 424. She need not slacken speed on a clear night, when there is no danger, and the sail vessel keeps her course—The Free State, 6 Amer. L. T. 401; 91 U. S. 200; The Sunnyside, Ibid. 217.

11 The Free State, 1 Brown Adm. 261; Jesmond *v.* The Earl of Elgin, Law Rep. 4, P. C. 1; The Scotia, 7 Blatchf. 308; The Milwaukee, 1 Brown Adm. 313; The Cognac, Holt's R. R. 133; The Concordia, Idem. 142; The Mary Sandford, 3 Ben. 100.

12 The Milwaukee, 1 Brown Adm. 313.

§ 360. Fog signals.—By day there must be fog enough to shut out the view of the sails or the hull, or by night the lights within the range of the horn, whistle, or bell.[1] If lights could be plainly and easily made out at a mile, it would not amount to a fog in the sense of the law.[2] A neglect to use proper fog signals is a fault.[3] A fog horn is of but little use to an approaching steamboat;[4] whether it can be heard on a steamer when in motion depends on circumstances.[5] Steamships and sailing ships, when not under way, shall use a bell.[6] A revenue steamer was held responsible for neglecting to indicate her position by an audible noise in case of a fog, though signaled to do so.[7] Steamboats on the Mississippi, running in a fog, neglect-

ing to sound the steam whistle at intervals, according to the rule for the government of pilots, are in fault, and chargeable with the results of a collision.[8] Where a steamer hears a fog horn on a vessel, she is chargeable with knowledge of risk of collision;[9] and if she stops her engine, but does not back, and is allowed to drift and come into collision, she is in fault.[10]

1 The Monticello *v.* Mollison, 17 How. 152; 1 Low. 184.

2 The Monticello *v.* Mollison, 17 How. 152; 1 Low. 184.

3 The Milwaukee, 2 Biss. 509; The Leo, 11 Blatchf. 225; The Alma, Holt. R. R. 259.

4 McCready *v.* Goldsmith, 18 How. 89; S. C. Abb. Adm. 235.

5 The Leo, 5 Ben. 264; The Bay State, Abb. Adm. 235; S. C. 18 How. 89.

6 The Robert & Ann *v.* The Lloyds, Holt. R. R. 55.

7 United States *v.* The Hudson, 14 Int. Rev. Rec. 36.

8 Security Ins. Co. *v.* The Milwaukee, 4 Am. L. T. 147.

9 The Hammonia, 4 Ben. 515; 11 Blatchf. 413.

10 The Matteawan, 4 Ben. 106.

§ 361. Signal lights.—By the maritime law, there was no regularly established rule that vessels should carry lights.[1] Under the old rule, there was no general obligation, on the high seas, to carry fixed lights;[2] but for the sake of avoiding misfortune, which in all probability is likely to occur, it was the duty of the vessel to exhibit them;[3] and when one boat carries a light and the other does not, the Court will treat the dark boat as the wrong-doer.[4] The exhibition of a light is a precaution so imperiously demanded by prudence that the neglect is considered as negligence *per se*.[5] The neglect may amount to contributory negligence, which will prevent the guilty vessel from recovering damages.[6] There not being lights will be taken notice of by the Court, though not noticed in pleadings or argument, and neither party can recover.[7] The rules of navigation as to the exhibition of lights are obligatory upon the commercial States of the world who have accepted them, and are regarded as the laws of the sea and subject to judicial notice.[8] The substance of the regulation is that the lights shall be fairly visible; there is no order that they shall be fixed in any peculiar manner, or in any particular part of the ship.[9] The light must not only be shown, but continued until the danger is past.[10] Whether they were properly placed is of no consequence, if the night was fine and each vessel saw the other four miles off.[11] Where the lights were lost in tempestuous weather, it is the duty of the vessel to procure new ones.[12]

1 The Rose, 2 W. Rob. 4; The Swea. 4 Notes of C. 97; The Sarah, Ibid. 98; The Iron Duke, 2 W. Rob. 377; Baker *v.* The City of New

York, 1 Cliff. 75; The Delaware v. The Osprey, 2 Wall. Jr. 268; The Fairbanks, 9 Wall. 422; St. John v. Paine, 10 How. 557; The Genesee Chief, 12 How. 443.

2 The Rose, 2 Notes of C. 101; The Iron Duke, 4 Notes of C. 97.

3 The Athol, 1 Notes of C. 592; The Columbine, 2 Ibid. 147; The Swea, 4 Ibid. 97; The Sarah, Ibid. 98; The Stadacona, 5 Notes of C. 372; The Osmanli, 7 Ibid. 507; The Fairy, Ibid. 509; The Benares, 7 Notes of C. 538; The Victoria, 6 Notes of C. 176. The rule is changed by statute. And see The Louisiana v. Fisher, 21 How. 7.

4 The Delaware v. The Osprey, 2 Wall. Jr. 268; 1 Am. Law Reg. 15; Pope v. the R. B. Forbes, 1 Cliff, 342.

5 Simpson v. Hand, 6 Whart. 311; The Oratava, 5 Mon. Law Mag. 45; The Columbine, 2 W. Rob. 27; The Blue Wing v. Buckner, 12 B. Mon. 246; Ward v. Armstrong, 14 Ill. 283; Taylor v. Harwood, Taney, 437; Cohen v. The Mary T. Wilder, Taney, 567. Vessels held in fault for not exhibiting lights in time: The Gloria Deo, Pratt on Lights, 35; The Imperatriz, Ibid.; The Clarence, Pratt on Lights, 36; The Rob Roy, 3 W. Rob. 191; The Juliana, Swabey, 20; The Neptune, Pratt on Lights, 58; The Guinare, Pratt on Lights, 59; The Mangerton, Swabey, 120; The Alma, Holt. R. R. 250.

6 Green v. The Adelaide, Taney, 575.

7 The Aliwal, Spinks, 95; 25 Eng. L. & E. 602.

8 The Scotia, 14 Wall. 171; The Continental, 14 Wall. 345.

9 The City of Carlisle, Brown & L. 363.

10 Dowell v. General S. N. Co. 5 El. & B. 195; 32 Eng. L. & E. 158; 38 Ibid. 64.

11 The Golden Pledge, Holt. R. R. 133.

12 The Aurora, Lush. 327.

§ 362. Lights required by statute.—By the Act of Congress of 1838, it is made the duty of the master and owner of every steamboat to carry one or more signal lights that may be seen by other boats navigating the same waters, under a penalty of two hundred dollars;[1] and by the Act of 1849, said lights were to be furnished with reflectors, etc., complete, and of a size to insure a good and sufficient light.[2] By the Act of Congress of 1864, the green and red side-lights shall be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.[3] All steamers, when under way, must carry a green light upon the starboard side, and a red light on the port side.[4] A steamer with a vessel in tow would be considered as standing on the same footing as any other steamer.[5] Sail vessels under way shall carry the same lights as steam vessels under way, with the exception of the white masthead lights, which they shall never carry.[6] A vessel driven from her anchors by a gale, and setting all sail to get out to sea, even if wholly unmanageable, is under way.[7] A green and a red light placed in the center of a schooner, forward, and separated only by a board, do not fulfill the requisites of the

statute; the lights must be at the sides.[8] The act providing that steamboats must carry one or more signal lights between sunrise and sunset does not extend to coal boats.[9] The red and green lights on small vessels, when not fixed, shall be exhibited on their respective sides in sufficient time to prevent a collision.[10] By the maritime law, fishing vessels are bound to show a light to a vessel approaching.[11] Fishing vessels and open boats, when at anchor or attached to their nets and stationary, shall exhibit a bright white light.[12] Where the night was moonlight, though occasionally obscured, there is no obligation imposed on a vessel to exhibit a light.[13] Where a tug lying at rest exhibited colored lights, a sailing vessel sinking her by collision, being guilty of no negligence, was held not in fault.[14] Each of the masthead lights shall be of the same construction and character as the masthead lights which other steamships are required to carry.[15] Vessels, when approaching each other, are bound to exhibit lights,[16] or when being approached by another vessel,[17] as a sail vessel approaching a steamer,[18] or discovering a steamer approaching her.[19] A bright light was held to be such a light as vessels of the particular class usually carried.[20]

1 Waring *v.* Clarke, 5 How. 441; The Santa Claus, Olcott, 428; Bullock *v.* The Lamar, 8 Law Rep. 275.

2 Foster *v.* The Miranda, Newb. 227; 6 McLean, 221; Chamberlain *v.* Ward, 21 How. 539, 572.

3 The City of Paris, Holt R. R. 15; The Lady of the Lake, Ibid. 38.

4 The Ottawa, 3 Wall. 268.

5 New York T. Co. *v.* Philadelphia S. N. Co. 22 How. 461; The Pleasant Valley, 7 Ben. 72.

6 The Hattie Ross, not reported; The City of London, Swabey, 245; The Hypodame, 6 Wall. 225; The Monticello *v.* Mollison, 17 How. 152; S. C. 1 Low. 184.

7 The George Arkle, Lush. 222.

8 The Scotia, 14 Wall. 170; The Empire State, 2 Biss. 216.

9 Elliott *v.* The James Nelson, 1 Pittsb. 6.

10 The Tuscar, Holt. R. R. 44.

11 The Olivia, Lush. 497.

12 The Robert and Ann *v.* The Lloyds, Holt. R. R. 55; The Napoleon III, Pratt on Lights, 33; The City of London, Swabey, 245; The James, Swabey, 55; The Clyde, Swabey, 23.

13 The Louisiana *v.* Fisher, 21 How. 1; Baker *v.* The City of New York, 1 Cliff. 75; The Tillie, 13 Blatchf. 514.

14 The Sunnyside, 6 Amer. L. T. 277.

15 The Zephyr, Holt. E. R. 24.

16 The Thomas Martin, 3 Blatchf. 517; The Ceres, Swabey, 250.

17 The Mangerton, Swabey, 120; The Urania, Swabey, 253; The Lena, Holt. R. R. 215; The Evangeline, Ibid. 222.

18 The Sunnyside, 91 U. S. 208.

19 The Parkersburgh, 5 Blatchf. 247.

20 Mackay v. Roberts, 9 Moore P. C. 357.

§ 363. Exhibiting false lights.—The exhibition of white lights at the masthead of a vessel instead of colored side-lights is sufficient to make her responsible for injuries from a collision caused thereby.[1] Where a vessel on a dark night, the weather being thick and cloudy, carried but one light, and thereby led those on another vessel to suppose that she was at anchor, and a collision took place, the vessel was guilty of negligence.[2] A steamer is justified in the belief that a steamer is a sailing vessel where improper lights are exhibited.[3] A British steamer may be excused for mistaking an American vessel for a steamer if the latter carries only a white light fastened low down at her bow.[4] The exhibition by a vessel of a prohibited light does not absolve the other vessel from the observance of that degree of caution, care, and skill which the exigencies of the case require.[5] If one vessel carries a wrong light the other vessel cannot for this reason keep her course nevertheless.[6] The vessel sailing with prohibited lights is under superior obligations to observe the strictest duty to avoid a collision.[7] Where a vessel lost her lights in a storm she may pursue her voyage with the prohibited white light so long as the necessity exists.[8]

1 Sears v. The Scotia, 2 Am. L. T. 60; fault by exhibition of false lights—The Austin, 3 Ben. 11.

2 The Santa Claus, 1 Blatchf. 370.

3 The Continental, 8 Blatchf. 7, distinguishing The Scotia, 7 Blatchf. 308.

4 The Scotia, 14 Wal. 170.

5 The Scotia, 7 Blatchf. 328; The Continental, 14 Wall. 345; Greening v. The Gray Eagle, 17 Am. Law Reg. N. S. 228; 9 Wall. 505; 1 Biss. 481. And see Chamberlain v. Ward, 21 How. 539; Swift v. Brownell, 1 Holmes, 467; The S. F. Gale and The Miranda, Newb. 234; The Hope, 1 W. Rob. 154.

6 Foster v. The Miranda, 6 McLean, 229; The Hope, 1 W. Rob. 154.

7 The Gray Eagle, 1 Biss. 481; Union S. S. Co. v. New York &c. Co. 24 How. 307.

8 The Gray Eagle, 1 Biss. 481; Union S. S. Co. v. New York &c. Co. 24 How. 307.

§ 364. Fault by omission to exhibit lights.—A vessel failing to exhibit her lights will be held in fault in case of a collision.[1] A vessel held in fault for not having her colored lights properly placed.[2] A tug held in fault for not having lights vertically to show that she had a tow.[3] Where a schooner displayed no lights, owing, as it was claimed, to unavoidable accident, due to the force of

the wind, she was held solely in fault, though the lookout on the other vessel was temporarily absent.[4] When traversing waters in the night time, where steamers may be expected, a vessel omitting to exhibit her lights ought not to recover against a steamer if the latter had a good lookout.[5] When the lights were burning so dimly as not to fulfill the purposes and objects required, they do not constitute a compliance with the statute.[6] So the temporary removal of a light when most needed is a fault in a sail vessel.[7] The burden is on the vessel not carrying the colored lights fixed to prove that it was impracticable to do so.[8] If it be proved that the vessel showed no lights, the burden is on her to show that the omission of lights did not cause nor contribute to the collision.[9] That lights were exhibited may be proved by affirmative evidence where there is a conflict in the testimony.[10] And where the existence of the light was proved the presumption is that it continued to burn.[11] Where one vessel carried wrong lights and the other failed in the use of lights, both were in fault.[12] On a failure to exhibit lights it requires a clear case to satisfy the court that it did not bring about the collision.[13]

1 The Parkersburgh, 5 Blatchf. 247; Bullock v. The Lamar, 8 Law Rep. 275; 1 West L. J. 444; The Frank Moffatt, 11 Ch. L. N. 114; Larco v. The Martha Elizabeth, 1 Sawy. 120; The Union. 7 Ben. 296; The City of Washington, 6 Ben. 138; 11 Blatchf. 487; Forfeiture of sailing vessels or omission of lights—Rev. Stats. sec. 4234.

2 The Gustav, Holt R. R. 28; The Nymph of Chester, Ibid. 34; The Lady of the Lake, Ibid. 38; The Smales, Ibid. 40; The Maria, Ibid. 105; The Fanny Buck, Ibid. 193.

3 The U. S. Grant and The Tally Ho, 7 Ben. 195.

4 The Wanata, 95 U. S. 600.

5 The R. B. Forbes, 1 Sprague, 328; The N. Y. &c. S. S. Co. v. Calderwood, 19 How. 241.

6 The Continental, 14 Wall. 358; Chamberlain v. Ward, 21 How. 539; The Ville du Havre, 7 Ben. 328.

7 Pope v. The R. B. Forbes, 1 Cliff. 342; Rogers v. The St. Charles, 19 How. 108.

8 The Calla, Swabey, 465; The Livingstone, Swabey, 519; The Union, 7 Ben. 296; The Java, 6 Ben. 189.

9 The Pennsylvania, 19 Wall. 136; The Fenham, 23 Law T. Rep. 329; Law Rep. 3 P. C. 212; The U. S. Grant, 7 Ben. 208; The Gray Eagle, 9 Wall. 510; Chamberlain v. Ward, 21 How. 539; The Adventure, Pratt on Lights, 119; Whittle v. Crawford, Ibid. 43; The Legatus, Swabey, 168; The Panther, Pratt on Lights, 42; The Southamton, Ibid. 96; The Boreas, Ibid. 43; The Mora Castle, Ibid. 45; The Calypso, Swabey, 28; The Bessie, Pratt on Lights, 45; The Adonis, Ibid. 50; The Vivid, 7 Notes of C. 127; Meigs v. The Northerner, 1 Wall. 682; The Pavonia, 1 Ben. 30; 18 Wall. 598.

10 The Adventure, Pratt on Lights, 114.

11 The Vivid, 7 Notes of C. 127.

12 The Continental, 14 Wall. 345.

13 The St. Charles, 19 How. 108; The Osprey, 1 Sprague, 245; The Ariadne, 13 Wall. 475; The Frank Moffatt, 11 Ch. L. N. 115; The Indiana, Abb. Adm. 330; The Thomas Lea, 33 Law J. Adm. 37; The Victoria, 3 W. Rob. 49; The Saxonia, Lush, 410; The Olivia, Ibid. 497.

§ 365. Lights for vessels at anchor.—All vessels, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern, visible all around the horizon,[1] so placed as to be visible to other vessels approaching her from any direction.[2] A vessel at anchor in a harbor or in a navigable river must show a light.[3] If ordinary prudence require the exhibition of a light, a general custom not to do so is no excuse.[4] Where a boat is anchored in the path of commerce, a light is indispensable, but not when fast to the shore at a place set apart for such boat to lie.[5] Pilot boats at anchor in roadsteads and fairways are required to exhibit a white light in a globular lantern of eight inches in diameter.[6] So a steam tug moored to a boom must exhibit a light.[7] Where a vessel at anchor at a proper place exhibited the legal lights, the burden is on the colliding vessel to show that she was without fault, or that the disaster was the result of inevitable accident.[8] The rule as to vessels at anchor exhibiting lights is imperative, whether the night be light or dark.[9] The failure to display the exact statutory light by a vessel at anchor is not sufficient contributory negligence to prevent a recovery of damages caused by the reckless navigation of another vessel.[10] Such neglect does not absolve the other vessel from an observance of the usual laws of navigation or of necessary precautions.[11]

1 The Adventure, Pratt on Lights, 29; Whittle *v.* Crawford, 37 Eng. L. & E. 466; The Telegraph, Pratt on Lights, 30; The Argo, Ibid.; The Volcano, 3 Notes of C. 210; Valentine *v.* Cleugh, 8 Moore P. C. 167; 29 Eng. L. & E. 49; The Palestine, Holt E. R. 52; The Harlequin, Pratt on Lights, 86; The Beaver, Ibid. 82; The Temiscouata, Ibid. 83; The Earl Bathurst, Ibid. 84.

2 The Indiana, Abb. Adm. 333; Train *v.* The North America, 2 N. Y. Leg. Obs. 67; Simpson *v.* Hand, 6 Whart. 311; Bullock *v.* The Lamar, 8 Law Rep. 275; 1 West. Law J. 444; Waring *v.* Clarke, 5 How. 441; The Santa Claus, Olcott, 428; 1 Blatchf. 370.

3 The Indiana, Abb. Adm. 330; Hain *v.* The North America, 2 N. Y. Leg. Obs. 67; Rogers *v.* The St. Charles, 19 How. 108. And see Corsley *v.* White, 21 Pick. 254; New Haven S. Co. *v.* Vanderbilt, 16 Conn. 420.

4 Kelly *v.* Cunningham, 1 Cal. 365; Innis *v.* The Senator, Ibid. 459.

5 The Bridgeport, 14 Wall. 119; Culbertson *v.* The Southern Belle, 18 How. 584; Ure *v.* Coffman, 19 How. 56; Willard *v.* Saulsbury, 1 Low. 97; The Granite State, 3 Wall. 310; Rogers *v.* The St. Charles, 19 How. 108; The James Gray *v.* The John Frazer, 21 How. 184.

6 The Wanata, 95 U. S. 600; 4 Ben. 310.

7 The Willard Saulsbury, 1 Low. 97.

8 The Clara and Clarita, 5 Ben. 381; The John Adams, 1 Cliff. 404; Sterling v. The Jennie Cushman, 3 Cliff. 636; The Scioto, 2 Ware, (Dav.) 359; Strout v. Foster, 1 How. 89; The Batavier, 2 W. Rob. 407.

9 The Harriet, 1 W. Rob. 182; she is in fault for not having lights or lookout—The Clara, 13 Blatchf. 509; The Sapphire, 11 Wall. 170; The Indiana, Abb. Adm. 330; The Mary T. Wilder, Taney, 567; The Lydia, 4 Ben. 523.

10 The Scottish Bride v. The Anthony Kelly, 1 Leg. Gaz. 289; 4 Amer. Law T. 225.

11 The Gray Eagle, 9 Wall. 511; Chittenden v. Brewster, 2 Wall. 191; The Continental, 14 Wall. 360.

§ 366. Vessels at anchor—Precautions necessary.—If a vessel is at anchor, another vessel must not anchor so near to her as to come into collision.[1] Embarrassment by proximity to vessels at anchor is not an excuse for not observing such rule where there is no justification for being in such proximity.[2] A vessel is bound to avoid another vessel, whether properly or improperly anchored, if practicable, or consistent with her own safety.[3] A vessel at anchor in a gale is bound to adopt the proper means to avoid a collision; and if she does not, she is a participant in the wrong, and must share in the loss.[4] Contributing to a collision by being anchored in an improper place deemed a fault.[5] In the absence of law or custom prohibiting it, it is not a fault to anchor in a narrow channel, if sufficient space is left for vessels to pass; but in such a case a vigilant anchor watch is imperatively necessary.[6] A schooner may lie at anchor in a channel 1,500 feet wide, with her sails up, although there was a puffy wind at the time.[7]

1 Griswold v. Sharpe, 2 Cal. 17; The Lincoln, 1 Low. 49; The Julia M. Hallock, 1 Sprague, 539; The Volcano, 2 W. Rob. 337; The Lidakjalf, Swab. 117; The Cumberland, Stu. V. A. 75; The Beaver, 2 Ben. 120; The Massachusetts, 1 W. Rob. 371; The Northampton, 1 Spinks Ec. and Adm. 152; The Echo, 3 Ware, 289; The Queen of the East, 4 Ben. 103.

2 The Hansa, 2 Ben. 299; S. C. 7 Blatchf. 288.

3 The Marcia Tribou, 2 Sprague, 17; O'Neil v. Sears, 2 Sprague, 52; Knowlton v. Sandford, 32 Me. 148; Cummins v. Spruance, 4 Harring. 315; The Batavier, 40 Jur. 19; 9 Moore P. C. 287.

4 The Sapphire, 11 Wall. 164.

5 Strout v. Foster, 1 How. 89; The Scioto, 2 Ware (Dav.) 359; The Marcia Tribou, 2 Sprague, 17; Amoskeag M. Co. v. The John Adams, 1 Cliff. 413. See O'Neil v. Sears, 2 Sprague, 52.

6 The Masters and Raynor, 1 Brown Adm. 346; The New Philadelphia, 1 Black, 62; McGrew v. The Melnotte, 1 Bond, 453.

7 The Planet, 1 Brown Adm. 124.

§ 367. Lookouts.—A vessel, not having a lookout properly stationed, independent of the helmsman, will be liable for injuries sustained in a collision with other vessels which were managed with ordinary care and skill,[1]

unless the collision was not owing to the absence of the lookout,[2] but the omission is *prima facie* evidence of fault.[3] The want of a competent and vigilant lookout on a steamer is a fault[4] of the grossest character.[5] So, steamers navigating the waters of a bay or river in the night time, must have a competent lookout,[6] or when navigating the western waters.[7] The precaution of a lookout is not indispensable where from the circumstances a lookout could not possibly be of service;[8] so where the officer of the deck is in full possession of all information that a lookout could give,[9] or where the colliding vessel contributes to the disaster by want of care or skill.[10] If there is no lookout, the want of a light on the other vessel is no ground for charging her with the collision.[11] Equally with other vessels, small boats and pilot boats are guilty of culpable negligence in sailing in the night time without a competent lookout properly stationed.[12] A steamer is bound to exercise the greatest care in approaching a sail vessel, and a neglect of this duty is contributory negligence,[13] and every doubt should be resolved against her, until clear proof to the contrary is adduced.[14] The lookout must be a trustworthy, constant lookout,[15] of suitable experience, vigilantly employed in that duty,[16] and whose special business is to perform that duty.[17] He must be additional to the helmsman.[18] The captain cannot perform this duty,[19] nor is the officer in charge of the deck competent,[20] nor a steward standing by the companion way.[21] The fact that the lookout was engaged just previous to the collision in hauling down the flying jib, was a fault directly contributory to the disaster.[22] A custom or usage of calling all hands to reef sails will not, when hands are short, dispense with the necessity of a lookout, especially at night.[23] There is no fixed position for a lookout, established by law;[24] his proper position is where he can see as well as in any other place.[25] He should be well forward, so stationed that he may be able to discern a vessel at the earliest moment;[26] so, persons stationed on the forward deck are properly placed,[27] but the pilot-house, in the night time, especially if very dark and the view obstructed, is not the proper place,[28] nor is it sufficient that he be placed aft of the pilot-house.[29] It is not the duty of a lookout to reannounce a light, where nothing has taken place to render a new order necessary or probable.[30] His testimony that there were no lights visible is affirmative evidence of that fact.[31] A lookout at the stern of the vessel is not required except when she is backing.[32]

1 Pope v. The R. B. Forbes, 1 Cliff. 347; The Catherine v. Dickinson, 17 How. 170; The Genessee Chief, 12 How. 443; The Blossom, Olcott,

17 The Lyon, 1 Brown Adm. 63; The New York *v.* Rea, 18 How. 225; The Ottawa, 3 Wall. 273; The William K. Perrin *v.* The Louisiana, 6 Amer. Law Reg. 422; Bullock *v.* The Lamar, 1 West. L. J. 444; Culbertson *v.* Shaw, 18 How. 585; The Genessee Chief, 12 How. 462.

18 The Genessee Chief, 12 How. 454; The New York *v.* Rea, 18 How. 225; St. John *v.* Paine, 10 How. 557; The Ottawa, 2 Wall. 273; The Blossom, Olcott, 194; The Emily, Ibid. 132; S. C. 1 Blatchf. 238; The Young America, 1 Brown Adm. 552; The Nabob, Ibid. 123; The Louisiana *v.* Fisher, 21 How. 1; The Tillie, 13 Blatchf. 514; The Coleman and Foster, 1 Brown Adm. 459; The Victor, Ibid. 449.

19 The Coleman and Foster, 1 Brown Adm. 459; The Young America, Ibid. 552; The Armstrong, Ibid. 130; The Zouave, Ibid. 110; The Hypodame, 6 Wall. 224; The Ottawa, 3 Wall. 268; The John Fretter, not reported; The Tillie, 13 Blatchf. 514; The City of New York, 8 Blatchf. 194.

20 The Parkersburgh, 5 Blatchf. 247; Hazlett *v.* Conrad, 1 Dill. 79; The Arthur Gordon, Lush. 270; The Obey, Law Rep. 1 Adm. 102; The Gray Eagle, 1 Biss. 481; Haney *v.* Baltimore &c. Co. 23 How. 287; Union S. S. Co. *v.* N. Y. &c. Co. 24 How. 307; The Blossom, Olcott, 194; The Emily, Ibid. 132; 1 Blatchf. 238; Poole *v.* The Washington, 9 N. Y. Leg. Obs. 321; The Empire State, 2 Biss. 216.

21 The Gratitude, 3 Ben. 108.

22 The H. P. Baldwin, 1 Brown Adm. 300.

23 The H. P. Baldwin, 1 Brown Adm. 300; The Catharine *v.* Dickinson, 17 How. 170; Thorp *v.* Hammond, 12 Wall. 408.

24 The Kallisto, 2 Hughes, 128.

25 The Morning Light, 2 Wall. 558; The Genessee Chief, 12 How. 443; St. John *v.* Paine, 10 How. 557.

26 The Kallisto, 2 Hughes, 128; St. John *v.* Paine, 10 How. 557; Newton *v.* Stebbins, Ibid. 606; The Genessee Chief *v.* Fitzhugh, 12 How. 443; The Pavonia, 5 Ben. 279; The James Adger, 3 Blatchf. 515; The Northern Indiana, 3 Blatchf. 92; Ward *v.* The Ogdensburgh, 5 McLean, 622; Newb. 139; N. Y. & B. T. Co. *v.* Philadelphia S. N. Co. 22 How. 461; Haney *v.* Baltimore S. P. Co. 23 How. 287; The New York *v.* Rea, 18 How. 225; The Clyde, 1 Spinks Ec. & Ad. 27; Netherlands S. Co. *v.* Styles, 9 Moore P. C. 286; The Europa, 2 Eng. L. & E. 557; The George, 5 Notes of C. 368; Jameson *v.* Drinkald, 12 Moore P. C. 148; The Shannon, 2 Hagg. Adm. 173; The Columbine, 2 W. Rob. 33; The Ericsson, Swabey, 38; Rusk *v.* The Freestone, 2 Bond, 235.

27 The Ottawa, 3 Wall. 273; Haney *v.* Baltimore &c. Co. 23 How. 287; The New York *v.* Rea, 18 How. 223.

28 The Ottawa, 3 Wall. 273; St. John *v.* Paine, 10 How. 557; The Genessee Chief, 12 How. 443; Chamberlain *v.* Ward, 21 How. 539; Killam *v.* The Erl, 3 Cliff. 461.

29 New York &c. Co. *v.* Philadelphia &c. Co. 23 How. 471; The Parkersburgh, 5 Blatchf. 247; Hazlett *v.* Conrad, 1 Dill. 79; Chamberlain *v.* Ward, 21 How. 539.

30 The Sunnyside, 6 Amer. Law T. 277.

31 The Sam Weller, 5 Ben. 293.

32 The Morning Star, 4 Biss. 62.

§ 368. Rules of navigation.—Every steam vessel which is under sail, and not under steam, shall be considered a sail vessel; and every steam vessel which is under steam, whether under sail or not, shall be considered a steam vessel.[1] Every vessel navigating the sea, not pro-

pelled by oars, is a sea-going ship.[2] The words "risk of collision" are not used in the same sense in articles 13 and 16; in the latter they apply only in cases of manifest danger.[3] The rules of navigation are to be strictly adhered to;[4] they are employed as standards to regulate the appreciation of care, skill, and fidelity with which the vessel performs her duties in cases of collision.[5] It is not advisable to allow these important regulations to be satisfied by equivalents, or by anything less than a close and literal adherence to what they prescribe;[6] but they are not absolutely inflexible.[7] Rules of navigation are obligatory upon vessels approaching each other from the time the necessity for caution begins, and so long as the means and opportunity to avoid the danger remain;[8] but they do not apply to vessels after approaching so near that collision is inevitable,[9] or while they are so far that measures of precaution have not become necessary.[10] They cannot be evoked by those who have rendered their observance impracticable, or eminently dangerous to human life.[11] If in the power of one vessel to avoid a collision by giving way, she is bound to do so notwithstanding the rules.[12] The purpose and spirit of the laws aim at the safety of the vessel, and the method is secondary.[13] They form a paramount rule of decision when applicable; but where a disputed question arises, evidence of experts is admissible.[14] The ordinary rules of navigation are binding upon vessels meeting pilot boats,[15] and on fishing vessels on their fishing grounds.[16]

1 The Hyppodame, 6 Wall. 216; The Carroll, 8 Wall. 302; The Fairbanks, 9 Wall. 420; The Corsica, 9 Wall. 630; The Scotia, 14 Wall. 170; The Continental, Ibid. 345; The Chesapeake, 5 Blatch. 411; The Huntsville, 8 Blatchf. 228. And see Rev. Stats. sec. 4233.

2 Cope *v.* Doherty, 4 Jur. N. S. 699.

3 The Free State, 1 Brown Adm. 251.

4 The Sunnyside, 1 Brown Adm. 250, explaining The Gray Eagle, 9 Wall. 505; The Pilot, 1 Biss. 159; The Scotland, 1 Ben. 295; The C. C. Vanderbilt, Abb. Adm. 361; The Oregon *v.* Rocca, 18 How. 570; The Hope, 1 W. Rob. 154.

5 The Santa Claus, Olcott. 435; The Hope, 1 W. Rob. 154; The Friend, 1 W. Rob. 478.

6 The Pennsylvania, 19 Wall. 135; The Emperor, Holt. R. R. 38.

7 The Santa Claus, Olcott, 435; The Friend, 1 W. Rob. 478.

8 New York &c. S. S. Co. *v.* Rumball, 21 How. 372; The Dexter, 23 Wall. 69; Bentley *v.* Coyne, 4 Wall. 503; The Nichols, 7 Wall. 663; The Ericsson, Swabey, 38; The Delaware *v.* The Osprey, 5 Pa. L. J. 172.

9 The Wenona, 19 Wall. 52; New York &c. *v.* Rumball, 21 How. 372.

10 The Wenona, 19 Wall. 52; The Monticello *v.* The Mollison, 17 How. 152; Baker *v.* The City of New York, 1 Cliff. 83; Newton *v.* Stebbins, 10 How. 580.

11 Baker v. The City of New York, 1 Cliff. 83; The Birkenhead, 2 W. Rob. 75; The Rose, 2 W. Rob. 1; The James Watt, 2 W. Rob. 270.

12 The Pilot, 1 Biss. 163; The Hope, 1 W. Rob. 154.

13 The Santa Claus, Olcott, 436; The Friend, 1 W. Rob. 478.

14 The City of Washington, 92 U. S. 31.

15 The Clement, 2 Curt. 363; The Blossom, Olcott, 188.

16 The Summit, 2 Curt. 150.

§ 369. River navigation.— Where a vessel is approaching a point of the river where there are dangerous obstructions, and in a high state of the wind, it is her duty to lie by till the wind has gone down.[1] Where, to avoid the danger from natural obstructions, a vessel changes her course after passing them, she is bound to resume her original course.[2] The owner of a steamer is bound to know the difficulties of the navigation.[3] Where a vessel is moving down with the current, meeting a vessel going up, the vessel moving the slowest is less bound to precaution.[4] An overtaking vessel must see to it that she selects the time and place in which to pass safely if the other does nothing to thwart her; and she is in fault in case of a collision.[5] The vessel being approached on her starboard side, on a rounding course intending to cross her bows, is under no obligations to promote the movement.[6] There is no general obligation upon vessels navigating rivers to keep to the right of the center of the channel,[7] but a local act requiring vessels to navigate as near as possible to the center of the river is binding.[8] In some States the boat going with the current is generally required to keep the middle of the stream, while the ascending boat keeps close to either shore;[9] in others the usage is, that both ascending and descending boats shall keep to the right of the center of the channel.[10] A neglect of a pilot to lay the course of the steamboat when approaching another boat, in conformity with the well-settled custom of boats plying on the river, or the failure to keep a proper lookout, is a fault in navigation which exposes a steamboat to liability for a collision.[11] When a steamer signals her desire to pass in an unusual manner, she has no right to change her course until it is certain that she has made the other steamer hear and understand her signals.[12] If, on approaching a tug, she signals a certain course, but receives no response, it is a fault in not slowing her engines.[13] Tugs approaching on converging lines, and one giving signal to pass to the larboard, and the answer is to pass to the port, and the first repeating the signal, which is not answered, the first should proceed cautiously, and not run across the lines of the other.[14] In departing from

the statutory regulations the vessel assumes the entire risk of her signal being heard and understood by the approaching vessel, and of herself hearing and understanding the reply.[15] A sail vessel coming down a river does not hold her course when without cause she changes from the west to the east side of the river.[16]

1 The Mohler, 21 Wall. 230.

2 The John L. Hasbrouck, 93 U. S. 405.

3 The Lady Pike, 21 Wall. 1.

4 Waring v. Clarke, 5 How. 502; The Chester, 3 Hagg. Adm. 316.

5 The Oceanus, 5 Ben. 546; 12 Blatchf. 430; The Narragansett, 5 Ben. 258; The Governor, Abb. Adm. 108; Whitridge v. Dill, 23 How. 448; The Rhode Island, 1 Blatchf. 363.

6 McNally v. Meyer, 5 Ben. 239; The Newport, 5 Ben. 231; 14 Int. Rev. Rec. 37.

7 The Milwaukee, 1 Brown Adm. 313.

8 The George Law and The T. V. Arrowsmith, 3 Ben. 467; The E. C. Scranton, 4 Ben. 127; 3 Blatchf. 50; The Bridgeport, 1 Ben. 65.

9 Williamson v. Barrett, 13 How. 101; Goslee v. Shute, 18 How. 463; Sinnott v. The Dresden, Newb. 474; Bates v. The Natchez, Ibid. 489; Goslee v. Shute, 18 How. 463; Jones v. Pitcher, 3 Stewt. & P. 135; Myers v. Perry, 1 La. An. 372; Drew v. The Chesapeake, 3 Doug. (Mich.) 33; Steamboat Co. v. Whilden, 4 Harring. 228; Moore v. Moss, 14 Ill. 106; Rogers v. McCune, 19 Mo. 557.

10 The Vanderbilt, 6 Wall. 225. See The Nymph of Chester, Holt R. R. 34.

11 The Magenta, 2 Abb. U. S. 495.

12 The Johnson, 9 Wall. 146; instance where both in fault—The Queen's County, 6 Ben. 146.

13 Meyer v. The Newport, 14 Int. Rev. Rec. 37.

14 The Louis Dole, 5 Biss. 172. And see The Quickstep, 2 Biss. 291; The Queen's County, 6 Ben. 146.

15 The Milwaukee, 1 Brown Adm. 326; The St. John, 7 Blatchf. 220; 2 Ben. 192; The Atlas, 4 Ben. 27; 10 Blatchf. 459; Stainback v. Rae, 14 How. 532.

16 The John L. Hasbrouck, 4 Ben. 359; 95 U. S. 405.

§ 370. In special cases.—Steamboats meeting on the Hudson River must pass to the right, unless there be such substantial reason why that cannot be done.[1] It is unlawful for two vessels of large size going in the same direction to be in Hell Gate together, and the one chargeable with being there is responsible for a collision.[2] The rule of the Chicago River is that a steamer must take the starboard side of the channel in ascending or descending; but should she wish to go to the port side, the proper signal is given by a whistle, to indicate her desire, and if the approaching steamer consents, the former may go to port.[3] The rule does not authorize one steamer to dictate to another a departure from the course prescribed by act of

Congress.[4] The rule that they should carry a boat astern with a line which may be thrown on shore is not applied with strictness to canal boats.[5] Outgoing tugs should keep to the south of the center of the channel, and incoming ones to the north.[6] The rules of navigation apply on the Chicago River to the extremity of the piers.[7] Boats which navigate the Ohio River, in either high or low water, must be held to a knowledge of the currents incident to the state of the water, and they must be held responsible on being driven by currents to the infliction of injury to the property of others.[8] During a high state of the water the descending boat should keep near the middle of the river, and an up-going boat may choose which side of the descending boat she will take.[9] Steamers on the Mississippi River, in fault for not sounding steam whistles at intervals not exceeding two minutes.[10]

1 The St. John, 7 Blatchf. 225; The Johnson, 9 Wall. 146.

2 The Narragansett, 5 Ben. 255.

3 The Brothers, 2 Biss. 104.

4 The Milwaukee, 1 Brown Adm. 313.

5 The B. S. Sheppard, 1 Biss. 221.

6 The Louis Dole, 5 Biss. 172.

7 The Louis Dole, 5 Biss. 172.

8 Hall *v.* Little, 18 Alb. L. J. 153; The Margaret, 94 U. S. 494; The Louisiana, 3 Wall. 173; The Granite State, Ibid. 310; Ure *v.* Coffman, 19 How. 56; Rogers *v.* The St. Charles, Ibid. 108; New York and V. S. S. Co. *v.* Calderwood, Ibid. 241; The Clarita and Clara, 23 Wall. 13; The Sea Gull, Ibid. 165; The Great Republic, Ibid. 29; Culbertson *v.* Shaw, 18 How. 584; Pearce *v.* Page, 24 Ibid. 228; Ibid. 313.

9 Keys *v.* The Ambassador, 1 Bond, 237; Schenck *v.* The Fremont, Id. 57.

10 The Milwaukee, 2 Biss. 509.

§ 371. Sail vessels meeting.—If two vessels are meeting end on, or nearly end on, so as to involve the risk of a collision, the helms of both shall be put to port, so that each may pass on the port side of the other, and a neglect to do so, or a starboarding, is a fault.[1] The "Golden Rule" of porting and passing to the right was established before the Act of 1864.[2] It lays down the rule stringently, and is not affected by subsequent acts of Congress.[3] It has exceptions only in extreme cases.[4] It applies whether the vessels are close hauled or not;[5] but only where both are sail vessels or both steamers.[6] It is obligatory only from the time precaution becomes necessary, and continues only so long as the means and opportunity to avoid the danger remain;[7] but it is the duty to port before the risk of collision has accrued.[8] Where neither ported helm in time, both vessels are in fault.[9] The fact that each

does not discover the other at the same moment does not materially affect the question as to which was in fault.[10] If vessels are approaching each other end on, with berth enough to exclude the possibility of their coming together, they are not required to port helm.[11] It would be a sufficient excuse for not porting helm that by porting she would have run aground,[12] or that it would promote a collision.[13] Although one vessel might have been properly considered as nearly close hauled, or as "running with good full," and neither so close but that a slight change to starboard could have been made, the vessel on the starboard tack is not relieved from porting her helm by the provisions of the 19th article.[14]

1 The Nichols, 7 Wall. 656; The Queen Dowager, Pratt on Lights, 58; The Gratitude, 4 Ben. 62; The Edmund Levy, 6 Ben. 371; The Sylvester Hale, 6 Ben. 523; The E. C. Scranton, 3 Blatchf. 53; The Niagara, 3 Blatchf. 37.

2 The Free State, 1 Brown Adm. 263; St. John *v.* Paine, 10 How. 557; The Nimrod, 15 Jur. 1201; The Duke of Sussex, 1 W. Rob. 270; The Rose, 2 W. Rob. 1; New York &c. Co. *v.* Philadelphia &c. Co. 22 How. 461.

3 The Free State, 1 Brown Adm. 263; The Nimrod, 24 Eng. L. & E. 589; St. John *v.* Paine, 10 How. 557; The Duke of Sussex, 1 W. Rob. 270; The Rose, 2 W. Rob. 1; N. Y. & B. Transp. Co. *v.* P. & S. S. N. Co. 22 How. 461.

4 The Louisa, 3 Ware, 132; The Oregon *v.* Rowe, 10 How. 572.

5 The Eliza, Holt R. R. 67. But see The Catharine Maria, Holt R. R. 87; The Wolverine, Holt R. R. 99.

6 Haney *v.* The Louisiana, Taney, 602.

7 The Dexter, 23 Wall. 69.

8 The Free State, 1 Brown Adm. 268; The Nichols, 7 Wall. 656; The Transit, 3 Ben. 193; The Tracy J. Bronson, 3 Ben. 341.

9 The Tracy J. Bronson, 3 Ben. 345; The Princessan Lovisa *v.* The Artemas, Holt R. R. 75; The Amelia *v.* The Catherine Maria, Ibid. 87; The Nichols, 7 Wall. 656.

10 Crowel *v.* The Radama, 2 Cliff. 551.

11 The George Law, 3 Ben. 466; The Nichols, 7 Wall. 656; Ward *v.* The Ogdensburgh, 5 McLean, 637; Newb. 153; The Rose, 2 W. Rob. 1.

12 The Mexican, Holt R. R. 130.

13 The Scotia, 7 Blatchf. 340; New York &c. Co. *v.* Philadelphia &c. Co. 22 How. 461.

14 The Tracy J. Bronson, 3 Ben. 344; The Princessan Lovisa *v.* The Artemas, Holt R. R. 75.

§ 372. Sail vessels crossing.—By the maritime law, a vessel going free must get out of the way of one close hauled, and the correlative duty is imposed on the vessel close hauled or sailing on the starboard tack to keep her course, while the one on the port tack gives way.[1] The vessel not obeying the rule is liable unless it shows that

§ 374. Steamers crossing.—If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.[1] The ship that has the other on her own starboard side shall keep out of the way of the other, and is in fault in not properly observing the approach, in changing to a course which promoted danger, and in not slowing, stopping, and backing when danger was obvious.[2] The rule should be steadily enforced.[3] The one more manageable is bound to avoid the other.[4] It is the duty of a steamer to keep out of the way of a tug and her tow.[5]

1 The Corsica, 9 Wall. 630; The Hansa, 2 Ben. 99; S. C. 7 Blatchf. 288; The Chesapeake, 1 Ben. 23; The Favorita, Ibid. 30; The Fingal, Holt R. R. 158; The William Hunter, Ibid. 161; The Cayuga, 14 Wall. 275; Whitridge *v.* Dill, 23 How. 448.

2 The Santiago de Cuba, 10 Blatchf. 454; The North Star, 8 Blatchf. 209.

3 The Chesapeake, 5 Blatchf. 411.

4 Waring *v.* Clarke, 5 How. 502; The Ann and Mary, 2 W. Rob. 189, 7 Jur. 999; The Shannon, 2 Hagg. Adm. 173; 7 Jur. 380; 1 W. Rob. 463.

5 The U. S. Grant, 7 Ben. 205; The Warrior, Law Rep. 3 Ad. & Ec. 553.

§ 375. Steamer meeting sail vessel.—If two vessels, one a sail vessel and the other a steam vessel, are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sail vessel, and the sail vessel shall keep her course;[1] and the steamer will be deemed in fault for not keeping out of the way,[2] without regard to mistakes or ignorance of her officers and crew.[3] A mail steamship is bound by the same rules of navigation as those which govern other steamers.[4] When the sail vessel changes her course the steamer should change also, to avoid a collision.[5] After the sail vessel has put about and come on her new course she is bound to keep it, and the steamer must keep out of her way.[6] The vessel is not obliged to keep on the wind for a steamer to pass her, except in special cases.[7] After the sail craft has selected her course she cannot return to her former course in front of an approaching steamer.[8] In a narrow channel the vessel is to beat out her tack and come about with all proper dispatch, leaving to the steam vessel the responsibility of position, enabling her to do so without danger.[9] The master of the steamer should assume that the sail vessel will fulfill her duty.[10] The rule relating to steamers meeting sailing vessels cannot be applied where the dangerous contiguity of the vessels is occasioned by incompetency or mismanagement of the sail vessel.[11] A

§ 376. Vessel to hold her course.—The duty of the sailing vessel, even with the wind free, to hold her course, is imperative.[1] She has no right to deviate,[2] except it be necessary to avoid immediate danger arising from natural causes,[3] or when there is an immediate danger of collision;[4] but she has no right to deviate because she *might* thereby avoid a collision, unless in case of imminent danger.[5] A vessel, whose duty it is to keep her course, should not anticipate the motions of the other vessel, and give way—the certainty which results from adhesion to general rules is absolutely essential to the safety of navigation.[6] She may rightfully rely on the steamer using precautions to avoid her,[7] up to the last moment, as if there was no danger,[8] as it is the duty of the steamer to adopt such precautions.[9] Where the sail vessel has her lights set and keeps her course, she is not in fault in case of a collision;[10] but if she varies, the steamer is responsible only for ordinary exertions to avoid her,[11] and the sail vessel will be in fault, if the steamer uses all reasonable exertions to avoid the danger under the unexpected change of course;[12] but a change of course in accordance with a hail from the steamer is not a fault.[13] A vessel bound to hold her course must not change because the other vessel takes no steps to get out of her way.[14] She cannot assume that irregularities will occur,[15] but the master would be blameless if the approaching ship neglects duty so long as to produce alarm in an experienced sailor.[16] Sailing vessels are in no way entitled to hold their own positions and courses under all circumstances, and rely upon steamers for a full guarantee, when navigating in their proximity.[17] So, when meeting or converging to a common point, she has no right to persist in her course as a privileged one, so as to make a collision probable.[18] If the breach of the rule requiring vessels to hold their course did not contribute to the collision, the violation will have no effect.[19]

1 The Sunnyside, 1 Brown Adm. 247; Bentley *v.* Coyne, 4 Wall. 509; The Scotia, 5 Blatchf. 227; The Continental, 8 Blatchf. 3; Wheeler *v.* The Eastern State, 2 Curt. 141; The Favorita, 8 Blatchf. 539; Taylor *v.* Harwood, Taney, 437; The City of Paris, 9 Wall. 634; The Western Metropolis, 7 Blatchf. 214; Haney *v.* The Louisiana, Taney, 602; The Kentucky, 4 Blatchf. 325; The Fannie, 11 Wall. 238; The Wesley Seymour, 7 Ben. 539.

2 The Sunnyside, 1 Brown Adm. 249; The Fashion, Newb. 8; S. C. 6 McLean, 152; The Lion, 1 Sprague, 40; The Carroll, 8 Wall. 302; The Johnson, 9 Wall. 146; Crockett *v.* Newton, 18 How. 581; The Free State, 1 Brown Adm. 251; N. Y. and L. Steamship Co. *v.* Rumball, 21 How. 372; The Scotia, 5 Blatchf. 227; The Catherine of Dover, 2 Hagg. Adm. 145.

3 The John L. Hasbrouck, 93 U. S. 405; The Cornelius C. Vanderbilt. Abb. Adm. 364; The Narragansett, Olcott, 388; The Neptune, Olcott, 483.

§ 377. Vessels overtaking.—Every vessel overtaking any other vessel shall keep out of the way of the last-named vessel.[1] She is bound to select her time and place so as to pass in safety.[2] If two vessels are going the same way, and one is a faster sailer than the other, and overtakes her, she is bound to keep out of her way;[3] but if the night is so dark that the vessel ahead cannot be seen, the vessel astern cannot be held to this rule.[4] If two steamboats are going in the same direction, the one ahead is entitled to keep her course, and the one astern must avoid a collision;[5] so, where the one ahead was a sailing vessel, and the one astern was being towed by a steamer.[6] There is imposed upon the rear boat an obligation to precaution and care which is not chargeable to the same extent to the other.[7] A vessel which unnecessarily attempts to pass another vessel in a difficult passage of navigation, does so at her peril, and is liable for damages for a collision.[8] So a steamer passing a tug and her tows is liable for a collision caused by the swells arising from her motion.[9] She is bound to know the depth of water, and whether her swell would endanger the tow.[10] She must first stop and ascertain the result of the sheer of the tug.[11] The leading vessel is not justified in changing her course so as to embarrass or throw herself across the track of the other.[12] The following vessel is bound to take proper measures to allow the other vessel to come about in changing tack.[13] A master approaching a vessel in stays has no right to speculate on the chances of her coming completely about, getting under headway, and avoiding him.[14] Making a wide sweep in turning, so as to gain headway, is not objectionable, unless there is danger of a collision in doing so.[15] Where both vessels are running free, the leading vessel must give way, and the one in pursuit must pass under her stern.[16] Where vessels are approaching each other in what pilot rules call the "first situation," the boat crossing the bow of the other must keep its course, and the other should port its helm and pass astern.[17] Where a vessel with the wind aft attempts to go astern of a close-hauled vessel on the port tack, and at that instant the latter came about, the latter was in fault for not keeping her course.[18] A steamer, about to cross another steamer on her starboard side, and being also the following vessel, was in fault in case of a collision.[19]

1 The W. H. Clark, 5 Biss. 302; The Grace Girdler, 7 Wall. 196; The Lena, Holt R. R. 61, 313; The Emma, Ibid. 252; The Intrepide, Ibid. 210; The Emily, Ibid. 217; The Royal Consort, Ibid. 220; The Evangeline, Ibid. 217; The Narragansett, 10 Blatchf. 475; The Peckforton Castle, 47 Law J. 12.

2 The Oceanus, 12 Blatchf. 430.

3 Whitridge *v.* Dill, 23 How. 448; The Ann Caroline, 2 Wall. 538. But see The Clement, 1 Sprague, 257; 2 Curt. 363.

4 The Morning Light, 2 Wall. 550.

5 The Governor, Abb. Adm. 108; The Rhode Island, Olcott, 505; 1 Blatchf. 363; Ward *v.* The Dousman, 6 McLean, 231; The General McCandless, 6 Ben. 223; McGrew *v.* The Melnotte, 1 Bond, 453.

6 The Carolus, 2 Curt. 69; McGrew *v.* The Melnotte, 1 Bond, 453.

7 The Great Republic, 23 Wall. 20; The W. H. Clark, 5 Biss. 302; Whitridge *v.* Dill, 23 How. 448; The Governor, Abb. Adm. 108.

8 Naugatuck T. Co. *v.* The Rhode Island, 7 N. Y. Leg. Obs. 38.

9 The C. H. Northam, 3 Blatchf. 31; 7 Ben. 249; The Morrisania, 11 Blatchf. 512; The Leo, 11 Blatchf. 225.

10 The Northam, 7 Ben. 249.

11 Nelson *v.* The Thomas Sparks, 18 How. Pr. 20.

12 The W. H. Clark, 5 Biss. 295.

13 Smith *v.* The Nellie D. 2 Int. Rev. Rec. 62; 5 Blatchf. 245.

14 The Charlotte Raab, Brown Adm. 456; The Argo, Swab. 464; The Priscilla, Law Rep. 3 Adm. and Ec. 125; The Nellie D. 5 Blatchf. 245.

15 Red Bank Ferry Co. *v.* The John W. Gandy, 7 Amer. Law Reg. 606.

16 The Rhode Island, Olcott, 516; Marsh *v.* Blythe, 1 Nott & McC. 170.

17 The Vancouver, 2 Sawy. 381; 18 Int. Rev. Rec. 103.

18 The Richard R. Higgins, 1 Low. 290.

19 The Columbia, 10 Wall. 246.

§ 378. Ferry-boats.—The ferry-boats are not bound to cease their trips by reason of a fog.[1] A ferry-boat must not leave her slip when there is danger of collision with a passing vessel;[2] but she is not bound to lie waiting for an expected arrival.[3] Where a ferry-boat, knowing the position of a steamer in a thick fog and at anchor, collided with her on a second trip, she was in fault.[4] Where a ferry-boat in a dense fog hears the whistle of an approaching boat, it is her duty to slow and back her engines till she can see the light of the other boat.[5] A ferry-boat is not in fault in not slowing when on her usual course, and after signal given and answered by an approaching propeller;[6] but she is in fault for not holding back to let a steamer pass ahead on notice by the steamer blowing two whistles.[7] So, where she saw a steamer which had already sheered to starboard to pass under the ferry-boat's stern, it was a fault in her to back instead of keeping right on.[8] It is culpable negligence to run on a dark night through a crowded harbor relying solely on a compass.[9] Steam ferry-boats are within the State law of navigation requiring vessels to keep in the middle of the channel;[10] they are in fault for being far out of their course.[11] A ferry-boat, having a steamer on her starboad side, is

bound to keep out of the way—the steamer to keep her course.[12] It is a fault in a ferry-boat for not stopping and backing as soon as she saw the tug turn, instead of merely slowing;[13] and a gross negligence for omitting to carry a whistle.[14] If a ferry-boat is unable to get into her slip by reason of impediments in the river, she may attempt to land her passengers at another place on the same side of the river.[15]

1 The Hudson, 5 Ben. 207.

2 The Favorita, 1 Ben. 30; 18 Wall. 598.

3 The Columbus, Abb. Adm. 384.

4 The D. S. Gregory, 6 Blatchf. 528; 7 Ben. 500.

5 The D. S. Gregory, 7 Ben. 500; 6 Blatchf. 528.

6 The John Taylor, 6 Ben. 227; The Favorita, 1 Ben. 30; 18 Wall. 598.

7 The Electra, 1 Ben. 282; 6 Ibid. 189; 7 Ibid. 344.

8 The Favorita, 1 Ben. 30; 18 Wall. 598.

9 Lenox *v.* The Winisimmet Co. 1 Sprague, 160.

10 The E. C. Scranton, 3 Blatchf. 53; The Bay State, 3 Blatchf. 48; 18 How. 89.

11 The Lydia, 4 Ben. 523; 11 Blatchf. 415.

12 The Fraz Sigel, 6 Ben. 550.

13 The Manhasset, 6 Ben. 301.

14 The Electra, 1 Ben. 282; 6 Ibid. 189; 7 Ibid. 344.

15 The Brooklyn, 1 Ben. 365.

§ 379. Duty of tug and tow.—The tug and tow are treated as one vessel, a steam vessel within the rule of keeping out of the way of sail vessels, the sail vessel to keep her course.[1] If two steam tugs are approaching a vessel from different directions, the one following in the wake of the vessel should come up on the starboard quarter and slacken speed, while the other from the opposite direction should round to, so as to head the same way as the vessel.[2] If, for any reason, the ordinary ranges, lights, or landmarks are obscured, it is the duty of the tug to take necessary precautions, either by slowing, stopping, or backing, or sounding the channel.[3] A propeller with a barge in tow is not within the rule which applies to sailing vessels; but when meeting a steamer she should keep to the right.[4] Some of the rules obligatory on steamers are not applicable to tugs engaged in towing—as a tug towing a fleet.[5] As to duty of keeping or changing course, sailing vessels in tow of steam tugs are to be considered as steam vessels.[6] Where a tug is working at a vessel aground, it is her duty to give way to passing vessels, though it may require a temporary suspension of her efforts.[7] And the master of a steamer approaching a tug so

employed has a right to rely on her observance of this duty as to the precautions demanded.[8] A tug with a tow must maneuver cautiously and prudently, and suction of water from a passing vessel is a natural incident to be guarded against.[9]

1 The Philadelphia &c. R. R. Co. *v.* The J. H. Gautier, 5 Ben. 469; 11 Am. Law Reg. 769; 5 Am. L. T. 87; The Ivanhoe & Martha H. Heath, 7 Ben. 213; The Nabob, 1 Brown Adm. 115; as a steamer and canal boat lashed together—5 Ben. 469; 1 Int. Rev. Rec. 39; Philadelphia &c. Co. *v.* The J. H. Gautier, 5 Ben. 469; 5 Am. L. T. 87; 16 Am. Law Reg. 769; 15 Int. Rev. Rec. 39; The America, 2 Ben. 475.

2 Sturgis *v.* Clough, 21 How. 451.

3 The Morton, 1 Brown Adm. 140; Chamberlain *v.* Ward, 21 How. 539; Ibid. 572; The Birkenhead, 3 W. Rob. 75; The Rose, 2 W. Rob. 1; The Perth, 3 Hagg. Adm. 414.

4 N. Y. Trans. Co. *v.* Philadelphia S. N. Co. 22 How. 461; The William Hunter, Holt R. R. 163.

5 Flannery *v.* The Ontario, 4 Pa. L. J. 312.

6 The Pennsylvania, 3 Ben. 215.

7 The Napoleon, 1 Brown Adm. 32.

8 The Napoleon, 1 Brown Adm. 32.

9 The Monitor, 4 Biss. 503; A Scow Without a Name, 7 Ben. 384.

§ 380. Departure from rules. — In general, established rules and known usages should be carefully followed; but no vessel is justified by a pertinacious adherence to a rule for getting into a collision with a ship which she might have avoided.[1] The rules are not inflexible, and a strict observance should be avoided when there is a plain risk in adhering to them;[2] they must not be stubbornly adhered to.[3] These rules have their exceptions in extreme cases, depending upon the special circumstances of the case, and in respect to which no general rule can be applied.[4] A tug encumbered with a ship in tow and proceeding stern foremost is a case of special circumstance under article 20 (now 24).[5] Extraordinary contingencies afford exceptions to ordinary rules, however positive.[6] While a vessel is not to be considered in fault merely because she takes an unusual course, yet where there is a usual and an unusual course the vessel taking the unusual course for convenience is bound to see that she does it in safety;[7] and the party in fault should bear whatever inconvenience or hardship may arise out of attendant difficulties and doubts.[8] Where a party is unlawfully placed in a situation which compels him to elect between two hazards, and is forced to choose upon the instant, he has the right of selection, and will not be responsible, although the most fortunate alternative was not adopted.[9] A vessel must bear the consequences of a contingency to which

she exposes herself.[10] A very clear case of departure from a rule of navigation must be made out before a vessel can be pronounced in fault for not regarding it.[11] On departure from the rules the vessel takes on herself the obligation of showing that the departure was necessary to avoid immediate danger, and that the course adopted was reasonably calculated to do so.[12] Both vessels will be in fault on keeping on, after each had been notified that the other was taking a course which would make a collision inevitable.[13]

1 Allen *v.* Mackay, 1 Sprague, 219; The C. C. Vanderbilt, Abb. Adm. 361; The Friend, 1 W. Rob. 478; The Commerce, 3 W. Rob. 295.

2 The Pilot, 1 Biss. 166; The Santa Claus, Olcott, 428; 1 Blatch. 370.

3 The Sunnyside, 1 Brown Adm. 250, explaining Crockett *v.* Newton, 18 How. 581.

4 St. John *v.* Paine, 10 How. 557; The Cayuga, 14 Wall. 276; New York &c. S. S. Co. *v.* Rumball, 21 How. 372; The Orinoco, Holt R. R. 98; The Flora, Ibid. 114; The Great Eastern, Ibid. 167; Brown. & L. 287; The Graaf Van Rechteren, Holt R. R. 247; The Emma, Ibid. 207; The Aura, Ibid. 255; The W. H. Clark, 5 Biss. 302; The Grace Girdler, 9 Wall. 196.

5 The Electra, 7 Ben. 349; The Arthur Gordon, Lush. 270.

6 The North Star, 8 Blatchf. 209; The Santa Claus, Olcott, 442; The Friends, 1 W. Rob. 478; The Pilot, 1 Biss. 166; The Santiago de Cuba, 10 Blatchf. 454.

7 Judd Co. *v.* The Java, 14 Wall. 189, reversing S. C. 1 Holmes, 15.

8 The Mayflower, 1 Brown Adm. 389; The Gazelle, 2 W. Rob. 279.

9 The Sunnyside, 1 Brown Adm. 245; Saltonstall *v.* Stockton, Taney, 11; S. C. 13 Pet. 181; The Scotia, 7 Blatchf. 308.

10 The Hope, 2 W. Rob. 8.

11 McCoy *v.* The Carrituck, 2 Hughes, 91; The Clement, 2 Curt. 363, The Hope, 1 W. Rob. 154.

12 The Agra, 4 Moore P. C. N. S. 435; The Corsica, 9 Wall. 630; The Chesapeake, 5 Blatchf. 411; 1 Ben. 23; The Concordia, Law Rep. 1 Adm. 93; Holt R. R. 142.

13 The Queens County, 6 Ben. 146.

§ 381. Error in extremis.—Where a vessel commits an error under impending danger, or *in extremis*, produced or brought about by another vessel, such error cannot be alleged as a fault.[1] Acts done in the excitement of the moment, and *in extremis*, are, if unwise, errors and not faults, whether wise or unwise is not material.[2] Even when a wrong order is given under the exigency of the circumstances it could not be considered a fault.[3] In a case of sudden emergency, leaving no time for deliberation, great allowance should be made for any error in judgment.[4] A vessel may put her helm to port or to starboard when a collision is inevitable, although it would have been an improper course to pursue before collision was in-

—Haney v. Baltimore S. & P. Co. 23 How. 395; N. Y. &c. Co. v. Rumball, 21 How. 372; The Genessee Chief, 12 How. 443.

9 The New Champion, Abb. Adm. 206; The William Young, Olcott, 38.

10 Rideout v. The City of Hartford, 17 Int. Rev. Rec. 125.

11 The Argus, Olcott, 313; The Harriet, 1 W. Rob. 182; The Celt, 3 Hagg. Adm. 321.

§ 382. Negligence.—When the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things, with proper care, does not happen, it is evidence in the absence of explanation that the accident arose from want of care.[1] Inability to prevent a collision exists at the time it occurs, but it is generally easy to trace the cause to some neglect or unskillful act, or antecedent omission of duty.[2] A commander of a steamer, who after hearing the whistle of an approaching vessel goes below to look after freight without special cause is in fault, if a collision occurs while he is below;[3] but the master is not bound to be on deck when the vessel is in charge of a second mate and a coasting pilot, and there is a sufficient crew.[4] The inability of the officer in charge to give instant orders to the engineer when a collision is impending is negligence.[5] Where the want of a licensed engineer did not contribute to the injury, it will not defeat a recovery.[6] Though a steamer displays proper lights, she will not be held blameless if she neglects other duties to avoid collision.[7] It is negligence on the part of a steamer in not seeing the lights of an approaching vessel,[8] and a gross fault for not perceiving that a light which must have crossed from larboard to starboard was in motion and not at anchor.[9] Where one vessel, owing to the darkness of the night in the direction she was sailing could not see a vessel until close up to her, but the other from her direction could see the first vessel at a much greater distance, the first vessel was not deemed in fault.[10] A vessel is in fault for exhibiting a confusion of lights.[11] The want of reasonable precautions on a steamer is a gross fault,[12] as when the vessel was in plain sight in sufficient time to have stopped and backed her engines,[13] or in not slacking her speed when the course of the other vessel was uncertain,[14] or in too great speed on a dark night,[15] or in sinking a vessel by a swell caused by her too great speed.[16] Evidence that a boat was racing is admissible to show negligence.[17] When a vessel is about to be launched, those in charge of her must give customary or reasonable notice.[17] It is negligence for a pilot to start a steamer from her slip

when standing aft where he could not see ahead, and thus ran into danger,[18] or without notice to other vessels, where the engines were put in motion, thereby creating a swell, which caused vessels to break from their moorings,[19] or where vessels at a slip are fastened together by lines, and one of them moves away without seeing that the lines are unfastened.[20] Where a bark was moored, and put out a fender to avoid injury from a colliding vessel, she is not liable for injury to such vessel caused by the fender.[21] Entering a harbor on a dark night with a heavy sea and a high wind, when access is difficult, is not necessarily negligence.[22]

1 Hall *v.* Little, 18 Alb. L. J. 152; Scott *v.* The London & St. Catharine's Dock Co. 3 Halst. & C. 594; Bowas *v.* Pioneer Tow Line Co. 2 Sawy. 21.

2 The Merrimac, 14 Wall. 203; Wakefield *v.* The Governor, 1 Cliff. 93; N. Y. &c. Co. *v.* Rumball, 21 How. 372; The Wenona, 19 Wall. 41.

3 Haslett *v.* Conrad, 1 Dill. 79.

4 The Obey, Law Rep. 1 Adol & E. 102.

5 The Forest Queen, 3 Ben. 181.

6 The Vancouver, 18 Int. Rev. Rec. 103.

7 The Continental, 14 Wall. 359; The Gray Eagle, 9 Wall. 505; 2 Biss. 25; 1 Ibid. 476.

8 The City of Norwich, 3 Ben. 575; The Santiago de Cuba, 4 Ben. 264; Grill *v.* General Iron & Screw Co. Law Rep. 1 C. P. 600; The Java, 6 Ben. 245; 14 Wall. 189.

9 The Gray Eagle, 9 Wall. 505.

10 The Elizabeth English, 7 Blatchf. 180.

11 The Huntsville, 8 Blatchf. 228; The William Young, Olcott, 41, distinguishing Hawkins *v.* Dutchess &c. Co. 2 Wend. 452; Lane *v.* The A. Denike, 3 Cliff. 117.

12 The Perseverance, Holt. R. R. 262.

13 The Electra, 1 Ben. 282; The Niagara, 7 Ben. 349; The Independence, Lush. 270; The Comet, 9 Blatchf. 323; The Neptune, Olcott, 496; The Shannon, 2 Hagg. Adm. 173; 7 Jur. 380; 1 W. Rob. 463.

14 The Huntsville, 8 Blatchf. 228.

15 The Neptune, Olcott, 496; The Perth, 3 Hagg. Adm. 414; The Shannon, 2 Hagg. Adm. 173; The Java, 6 Ben. 245; 14 Wall. 189.

16 Netherlands S. Co. *v.* Styles, 40 Eng. L. & E. 286; Smith *v.* Dobson, 3 Man. & G. 59; The C. H. Northam, 13 Blatchf. 31.

17 The Vianna, Swabey, 405; Myers *v.* Perry, 1 La. An. 372.

18 The State of New York, 3 Ben. 253.

19 The Leo, 3 Ben. 571; The Washington, 5 Jur. 1067; 2 Ma. L. C. 22; The Morrisania, 13 Blatchf. 512.

20 The Thornton, 2 Ben. 429.

21 The New York, 6 Ben. 406.

22 The Juniata Paton, 1 Biss. 15.

§ 383. Faults.—If the unskillfulness or want of necessary qualifications of the deck officer contributed to the collision, the vessel under his charge will be considered in fault.[1] The want of an anchor on a vessel to prevent her from drifting is a fault;[2] so, where the long boat was swung in an improper place,[3] or allowing a vessel to gain too close proximity;[4] but it is not a fault in a sail vessel to be under way in a fog.[5] The master has no right to do acts or omit precautions which tend to the injury of others, in order to save the property of his owners.[6] It is fault in a steamer for not taking proper precautions[7] to avoid a drifting vessel;[8] or for attempting to pass a vessel aground in a narrow channel;[9] or for going at too great speed on a dark and stormy night;[10] or, when running down the river in a thick fog, for running into a vessel at a pier, although she stopped and backed and had two lookouts[11]—in running near a dock, she must take the consequences of finding her way blocked;[12] or for not slowing her speed as she rounded a point just above the ferry;[13] or for not slowing and backing when uncertain of the course of an approaching vessel;[14] or for taking a position so near to a sail vessel that a collision will ensue from drifting;[15] or for changing her course before ascertaining whether it would increase or diminish the danger;[16] or for not having a vigilant lookout;[17] and for starboarding instead of porting, and for not stopping and reversing, and clear proof of contributory negligence of the other steamer must be produced;[18] or for stopping when crossing and thereby precipitating a collision;[19] or for not complying with the rule of river navigation.[20] It is bad seamanship in a propeller to put only a short distance between herself and a tug, and not slacken speed when she came into collision with the tow.[21] Steamers leaving a slip simultaneously will both be deemed in fault in case of a collision.[22] Complying with the statute regulations as to lights will not excuse or exonerate a steamer when special circumstances are such as to call for extraordinary measures to apprise the other vessel of her proximity and character.[23] A schooner is in fault for luffing when a ferry-boat was approaching,[24] or for luffing and missing stays and falling across the hawser of a tug and tow,[25] or for filling away again across the new course of a steamer after coming up into the wind and heaving the lead,[26] or for coming about without heeding the propeller when she should have run out her tack.[27] Where a schooner was crossing the course of a steamer toward the port side, the steamer was in fault for starboarding.[28] In case of collision, either vessel

is bound to render any aid which may be in her power necessary to the safety of the other,[29] and courts of admiralty may consider the fact of a vessel deserting, without cause, another vessel which has been injured in a collision with her, as a circumstance tending to show consciousness of fault.[30] On boats navigating the western waters, the absence of a competent and vigilant watch to assist and advise the pilot in his duties is *prima facie* evidence of fault.[31]

1 Chamberlain *v.* Ward, 21 How. 548; Haney *v.* Baltimore S. P. Co. 23 How. 287; Union S. S. Co. *v.* N. Y. &c. Co. 24 How. 307.

2 Cramer *v.* Allen, 5 Blatchf. 248.

3 The Avid, 3 Ben. 434; The Phœnix, 3 Blatchf. 273.

4 The Lucille, 15 Wall. 679; The Carroll, 8 Wall. 302.

5 The Mallcawau, 4 Ben. 107, distinguishing The Sylph, 4 Blatchf. 24.

6 Sherman *v.* Mott, 5 Ben. 372.

7 The Fashion *v.* Ward, 6 McLean, 175; St. John *v.* Paine, 10 How. 557. And see *ante*.

8 The Island City, 5 Blatchf. 264.

9 The Ellen S. Terry, 7 Ben. 401.

10 The Leo, 11 Blatchf. 225.

11 The Bridgeport, 1 Ben. 65.

12 The Ivanhoe and Martha H. Heath, 7 Ben. 213.

13 The Electra, 1 Ben. 282; 6 Ibid. 189; 7 Ibid. 344.

14 The Hermann, 4 Blatchf. 441; The Western Metropolis, 2 Ben. 402.

15 Butterfield *v.* Boyd, 4 Blatchf. 356; 18 How. Pr. 527.

16 The Sea Gull, 23 Wall. 165; The Cambria, 3 Ben. 334. And see *ante*.

17 The Sea Gull, 23 Wall. 165; The Comet, 9 Blatchf. 323; The Alabama and Gamecock, 1 Ben. 476; Killan *v.* The Erl, 3 Cliff. 456; The John H. Abcel, 4 Ben. 58; The Cambria, 3 Ben. 334; The James Roy, 5 Ben. 177; 14 Int. Rev. Rec. 22; The Gratitude' 3 Ben. 108; The Douglass, 1 Brown Adm. 105.

18 The Comet, 9 Blatchf. 323.

19 The Northfield, 4 Ben. 112.

20 The Vanderbilt, 6 Wall. 225; Shirley *v.* The Richmond, 2 Woods, 58.

21 The Maria Martin, 2 Biss. 41; The Alabama and Gamecock, 1 Ben. 476.

22 The Boston, Olcott, 407.

23 The R. W. Burrowes, 7 Blatchf. 374.

24 The Jay Gould, 7 Ben. 566.

25 The Hibernia, 5 Ben. 353.

26 The Virgo, 7 Ben. 495; The Lady Ellen, 4 Ben. 340.

27 The Nereus, 3 Ben. 238.

28 The Vicksburg, 7 Blatchf. 216.

29 The Clarita and Clara, 23 Wall. 1.

30 The Atlas, 4 Ben. 38; The Catalina, 2 Spinks Ec. & Ad. 23; The St. Lawrence, 7 Notes of C. 556; The Celt, 3 Hagg. Adm. 321.

31 Western Ins. Co. *v.* The Goody Friends, 1 Bond, 459; Haney *v.* Balt. S. P. Co. 23 How. 287; Chamberlain *v.* Ward, 21 How. 539, 572.

§ 384. Inevitable accident. — Different definitions are given of inevitable accident from the different circumstances attending the collision to which the rule is to be applied.[1] An inevitable accident is that which the party charged with the offense could not possibly prevent by the exercise of ordinary care, caution, or nautical skill;[2] and it may occur in the daytime,[3] as where a steamer, in a crowded harbor, ran into a small schooner which could not be seen by reason of an intervening ship,[4] or where two steamers collided in a dense fog, each going at the same speed, and no fault imputable to either.[5] Where a vessel is pursuing a lawful avocation in a lawful manner, with proper precautions against danger, and an accident occurs, it is an inevitable accident;[6] so where a vessel is powerless to prevent the accident.[7] Collisions occurring in consequence of the darkness of the night, and without fault on the part of either party, are inevitable accidents;[8] so where a steamer could, by no diligence, discover a sail vessel at a sufficient distance to avoid her.[9] Strong proof should be required to charge a vessel with fault where the sea was running high, the night was dark, and a storm was prevailing.[10] When a collision takes place by inevitable accident, without blame in either party, as by any *vis major*, the loss is to be borne by the party on whom it falls.[11] If a vessel performing a salvage service injures another, it is generally considered as an unavoidable accident.[12] A collision in open sea in broad daylight between vessels whose courses on the tacks on which they were sailing necessarily intersected each other, cannot be attributed to unavoidable accident.[13]

1 The Morning Light, 2 Wall. 560; Union S. S. Co. *v.* N. Y. &c. Co. 24 How. 307; Amoskeag M. Co. *v.* The John Adams, 1 Cliff. 412; The Lochlibo, 3 W. Rob. 318; The Europa, 2 Eng. L. & E. 557.

2 The Morning Light, 2 Wall. 561; The Mabey and Cooper, 14 Wall. 215; Union S. S. Co. *v.* N. Y. &c. Co. 24 How. 307; The James Gray *v.* The John Frazer, 21 How. 184; The Baltic, 2 Ben. 454; The Lady Pike, 2 Biss. 144; The Colorado, 1 Brown Adm. 403; The Brooklyn, 4 Blatchf. 365; The Bridgeport, 1 Ben. 65; The Virgil, 2 W. Rob. 201; 7 Jur. 1174; The Rose, 2 W. Rob. 1; 7 Jur. 381; The Shannon, 2 Hagg. Adm. 173; 1 W. Rob. 463; 7 Jur. 380; The Lochlibo, 3 W. Rob. 318; The Europa, 2 Eng. L. & E. 557; The England, 5 Notes of C. 170; The John Buddle, Ibid. 387; The Juliet Erskine, 6 Notes of C. 633; The Mellona, 5 Notes of C. 450; The Perseverance, Holt R. R. 262; The Woodrop Sims, 2 Dods. 83; The Carrier Dove, Brown & L. 113; The Argo, Swabey, 464; The Peerless, Lush. 30; The Batavier, 9 Moore P. C. 287; Killam *v.* The Eri, 3 Cliff. 456; Lucas *v.* The Swann, 6 McLean, 288 The Fanny Fern and Thomas Swann, Newb. 163.

3 Crockett *v.* Newton, 18 How. 581. And see The Java, 1 Low. 168.

4 Crockett *v.* Newton, 18 How. 581; The Java, 14 Wall. 189.

5 The Sylph, 4 Blatchf. 24; Ward *v.* The Fashion, Newb. 8; 6 McLean, 152; The Grace Girdler, 7 Wall. 196, explained in The Comet, 1 Abb. U. S. 454.

the steamboat does not show any fault on the part of the sailingvessel, it is not an inevitable accident on her part.[14]

1 The Granite State, 3 Wall. 314; The Louisiana, 3 Wall. 164; The Lady Pike, 21 Wall. 17; N. Y. &c. Co. v. Rumball, 21 How. 372; The Morning Light, 2 Wall. 550.

2 The Juliet Erskine, 6 Notes of C. 634.

3 The Thomas Martin, 3 Blatchf. 517; The Spray, 13 Wall. 366.

4 The Virgil, 2 W. Rob. 201. This rule not to apply to sailing on the open sea—The Morning Light, 2 Wall. 550; The Ebenezer, 2 W. Rob. 206; 7 Jur. 1117; The Itinerant, 2 W. Rob. 236.

5 The John Tucker, 5 Ben. 370; Union S. S. Co. v. N. Y. and V. S. S. Co. 24 How. 307; The Morning Light, 2 Wall. 550; The Louisiana, 3 Wall. 164; Vantine v. The Lake, 2 Wall. Jr. 52; The Moxey, 1 Abb. Adm. 73; The Brooklyn, 4 Blatchf. 365; The Baltic, 2 Ben. 452. And see The Russia, 3 Ben. 471; 4 Ibid. 572.

6 The Johannes, 10 Blatchf. 481; The Buzzard v. The Petrel, 6 McLean, 491; The Louisiana, 3 Wall. 164; Union S. S. Co. v. N. Y. & V. S. S. Co. 24 How. 307; Lucas v. The Thomas Swann, 6 McLean, 282; Newb. 158; The Fremont, 3 Sawy. 571.

7 The Fremont, 3 Sawy. 571; The Midas, 6 Ben. 173; Sherman v. Mott, 5 Ben. 372.

8 The Queen of the East, 4 Ben. 103.

9 The Johannes, 10 Blatchf. 481; Union S. S. Co. v. New York &c. Co. 24 How. 307.

10 The A. R. Wetmore, 5 Ben. 147.

11 Sherman v. Mott, 11 Amer. Law Reg. 716.

12 The Clara Clarita, 5 Ben. 383; The Juliet Erskine, 6 Notes of C. 633.

13 Hall v. Little, 18 Alb. L. J. 152; The Louisiana, 3 Wall. 164.

14 The Lady Ellen, 4 Ben. 344; New York &c. Co. v. Rumball, 21 How. 372; The Carroll, 8 Wall. 302.

§ 386. Contributory negligence.—Where damage is occasioned by carelessness of the party injured, an action will not lie.[1] He cannot recover if it appear to have been caused in any manner by his own misconduct or fault;[2] but this does not mean that he must be entirely faultless.[3] If the collision is occasioned by mischance, imputable chiefly to negligence on the part of the injured vessel, the action will be dismissed with costs.[4] To preclude a recovery, the negligence of plaintiff must be such that defendant could not, by ordinary care and prudence, have avoided the consequences of it;[5] so some contributory negligence on the part of a tow colliding with another tow will not prevent a recovery against the tug.[6] The negligence of one vessel will not be an excuse for fault in the other,[7] not even a flagrant fault;[8] nor will it excuse the want of ordinary care and diligence,[9] even when the libellant committed the first fault.[10] The negligence of one party will not justify the violation of well-known rules by the other;[11] so the fault of a sail vessel will not excuse the

fault of the steamer, if the latter in any way contributed to the collision,[12] nor can inevitable accident be pleaded where care and prudence and a proper display of nautical skill is not shown.[13] It is not enough to show that a particular act or movement would prevent a collision; it must further appear that it is the legal duty to make it.[14] The party in fault is held to the strictest proof of wrong on the other party.[15] The proximate cause of injury is to be considered. A vessel is not shielded from liability by proof of negligence or fault on the part of the other vessel not having connection with the act that produced the injury.[16] Where, after a collision between two tugs, the libellant left his tug and took refuge on the other, and in trying to regain his own tug he was injured by a second collision, the second collision and his own negligence were the proximate causes of the injury, and he could not recover.[17] When a ship is carrying a great press of sails, if it is not the cause of the collision, it is a circumstance not to be considered; but if, looking to the state of the wind and weather, it was contributory to the collision, it is a misdemeanor, for which the party so acting must suffer.[18] A gross and criminal departure from well-settled rules will preclude a recovery.[19] A steamer is not in fault for not stopping when the responsibility of stopping or going ahead was forced upon her by a false maneuver of the sail vessel.[20]

1 U. S. v. The Baltic, 7 Int. Rev. Rec. 77; Hull v. Richmond, 2 Wood. & M. 345; Waring v. Clarke, 5 How. 441; Vanderplank v. Miller, Moody & M. 169; Newton v. Stebbins, 10 How. 536; Rathbun v. Payne, 19 Wend. 399. Where every precaution is taken by the steamer and damage is caused by negligence of the vessel, the vessel is in fault—The Pacific and Fashion, Newb. 29. The Oneota, 11 N. Y. Leg. Obs. 353; The Isaac Newton, 12 N. Y. Leg. Obs. 299; Lowry v. The Portland, 1 Law Rep. 313; The New Jersey, Olcott, 415.

2 The Emily, Olcott, 132; 1 Blatchf. 238; The Bay State, Abb. Adm. 140. As where the mate obeys a wrong order from the other vessel—The Huntress, 2 Sprague, 61. So the owner of the vessel giving directions to the mate of the other vessel cannot recover—Ibid.

3 Raisin v. Mitchell, 9 Car. & P. 613; Halderman v. Beckwith, 4 McLean, 286.

4 The William Young, Olcott, 42; Handayside v. Wilson, 3 Car. & P. 528; The Catherine of Dover, 2 Hagg. Adm. 145; Bayby v. Barrow, 2 Cromp. & M. 22; Butterfield v. Forrester, 11 East, 60.

5 Mills v. The Nathaniel Holmes, 1 Bond, 360; Kerwhaker v. Cleveland &c. R. R. 3 Ohio St. 172; Cleveland &c. R. R. Co. v. Elliott, 4 Ohio, 474; Elliott v. The James Nelson, 1 Pittsb. 6; Adams v. Wiggins F. Co. 27 Mo. 95; The Baltimore, 8 Wall. 387; The Hannah Park v. The Lena, Holt R. R. 315; Butterfield v. Forrester, 11 East, 60; Bridge v. Grand Junction R. Co. 3 Mees. & W. 244; Davies v. Mann, 10 Mees. & W. 545; Gen. S. N. Co. v. Tonkin, 4 Moore P. C. 314; Tuff v. Warman, 2 Com. B. N. S. 740.

6 The Morton, 1 Brown Adm. 137.

7 The Western Ins. Co. *v.* The Goody Friends, 1 Bond, 459; The Ariadne, 13 Wall. 479; The Dexter, 23 Wall. 69; The Gray Eagle, 9 Wall. 505; Chamberlain *v.* Ward, 21 How. 539; Bowas *v.* Pioneer Tow Line, 2 Sawy. 23; Davies *v.* Mann, 10 Mees. & W. 546; The Mayor of Colchester *v.* Brookes, 7 Q. B. 377; Greculand *v.* Chaplin, 5 Exch. 243.

8 The Maria Martin, 12 Wall. 31; The Manistee, 7 Biss. 35.

9 Foster *v.* The Miranda, 6 McLean, 227; The Cynosure, 1 Sprague, 88.

10 Lane *v.* The Denike, 3 Cliff. 117; The Perseverance, Holt R. R. 262.

11 Chamberlain *v.* Ward, 21 How. 539; Larco *v.* The Martha and Elizabeth, 1 Sawy. 133: The Free State, 91 U. S. 206.

12 The Ariadne, 13 Wall. 479; Chamberlain *v.* Ward, 21 How. 539; The Gray Eagle, 9 Wall. 505.

13 The Clarita and Clara, 23 Wall. 1.

14 The Sunnyside, 1 Brown Adm. 242; The Continental, 8 Blatchf. 3; Williamson *v.* Barrett, 13 How. 101; The Eastern Stave, 2 Curt. 141; The Favorita, 8 Blatchf. 539; Taylor *v.* Harwood, Taney, 437; The City of Paris, 9 Wall. 634; The City of New York, 1 Cliff. 75; The H. P. Baldwin, 1 Brown Adm. 303.

15 The Sunnyside, 1 Brown Adm. 245: The Comet, 9 Blatchf. 323.

16 Mills *v.* The Nathaniel Holmes, 1 Bond, 352; Western Ins. Co. *v.* The Goody Friends, 1 Bond, 459; Kelley *v.* Thompson, 1 Low. 125; Chamberlain *v.* Ward, 21 How. 539.

17 The Union, 2 Biss. 18.

18 The Chancellor, 4 Ben. 162; The Lord Saumarez, 6 Notes of C. 600.

19 The Sunnyside, 1 Brown Adm. 247; The Comet, 9 Blatchf. 323; McCoy *v.* The Curntuck, 2 Hughes, 91; Williamson *v.* Barrett, 13 How. 101; Goslee *v.* Shute, 18 How. 463.

20 The Virgo, 7 Ben. 495; The George Law, 3 Ben. 396.

§ 337. Burden of proof of fault.—The burden of proof is on the libellant to establish fault in the vessel libelled.[1] He must prove both care on his part, and the want of care on the part of the defendant.[2] He must show the other vessel in fault, and that his was managed in a prudent and skillful manner, and interposed no needless impediments,[3] and that he took all proper precautions and means to prevent the collision; as showing negligence or fault on the part of the other vessel is not sufficient,[4] unless there is a *prima facie* case of negligence and bad seamanship, and inevitable accident is alleged.[5] Where a party admits the injury, but sets up justificatory or excusatory matter, the burden of proof of such matter is on him;[6] so, proof that the injured vessel was blameless casts the burden of exoneration on the colliding vessel.[7] The circumstances may be such that on proof of the situation of the injured vessel the other is put to the proof of due care, caution, or skill on her part.[8] The fact of being in stays being proved, the burden is on the other vessel to show that the first vessel was improperly in stays, and that the collision was inevitable.[9] In an action for dam-

ages to a sail vessel by a steamer, the sail vessel must be proved clear of all culpable conduct conducing to the collision.[10] She is bound to prove her conduct correct, both in what was done and omitted to be done,[11] as the necessity for alteration of her course;[12] so, if she has been guilty of some negligence, the burden is on her to prove that this negligence is not the cause of the collision;[13] or, where she had proper means of protection, to show that the collision was not owing to her negligence, but that it would have equally happened,[14] or that the collision was not the result of her neglect.[15] If a vessel disregards the provisions of a statute, the burden is on her to show that the accident was not owing to such neglect.[16] In a collision by a steamer on a sailing vessel on her starboard tack, the steamer must show some improper act or omission on the part of the sailing vessel, or it will be presumed that the steamer neglected to use precautions required by law.[17] Unless a sailing vessel, by changing her course, embarrasses a steamer, in her care to avoid collision, the steamer is presumptively responsible.[18] It is not necessary for the libellant to trace specifically in what the negligence consists: if the accident arose from inevitable fatality, it is for the defendants to show it.[19] It is not enough to show that the collision could not have been avoided at the moment, if it might have been by previous precautions.[20] Every doubt as to the performance of duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated, until she vindicates herself by conclusive testimony;[21] but the law requires preponderating evidence to fix the loss on the party charged.[22] Where one vessel is clearly proved to have neglected a duty imposed by law, she will be responsible for all loss, unless it also appear that the collision was not caused by such neglect.[23] The rule that the testimony of the crew of one vessel as to her conduct and movements is to be believed in preference to the testimony of the crew of the other vessel, has no application to testimony as to exhibition of lights.[24]

1 **Pettitt** *v.* **The Kallisto**, 2 Hughes, 128.

2 **The Steam Tug William Young, Olcott**, 38; **The Steam Ferry-boat Relief**, Ibid. 104; **The Columbus**, Abb. Adm. 37; **The Governor**, Ibid. 108; **The Fashion** *v.* **Ward**, 6 McLean, 152; **Carsley** *v.* **White**, 21 Pick. 254; **Lane** *v.* **Crombre**, 12 Pick. 177; **New Haven S. Co.** *v.* **Vanderbilt**, 16 Conn. 420; **Kennard** *v.* **Burton**, 25 Me. 39; **Rathbun** *v.* **Payne**, 19 Wend. 399; **The Bolina**, 3 Notes of C. 203; **Vennall** *v.* **Garner**, 1 Cromp. & M. 21; **Vanderplank** *v.* **Miller, Mood. & M.** 169; **Davies** *v.* **Mann**, 10 Mees. & W. 546; **Handayside** *v.* **Wilson**, 3 Car. & P. 528; **Butterfield** *v.* **Forrester**, 11 East, 60; **Smith** *v.* **Dobson**, 3 Man. & G. 59; **Bridge** *v.* **Grand Junc. R. Co.** 3 Mees. & W. 244; **Drew** *v.* **The Chesapeake**, 2 Doug. (Mich.) 33; **Sills** *v.* **Brown**, 9 Car. & P. 601; **Marriott** *v.* **Stanley**, 1 Scott N. R. 382;

Raisin *v.* Mitchell, 9 Car. & P. 613; Schenck *v.* The Fremont, 1 Bond, 57; Butterfield *v.* Boyd, 4 Blatchf. 356; 18 How. Pr. 527.

3 The New Champion, Abb. Adm. 207; Smith *v.* Condry, 1 How. 28; The Alexander Wise, 2 W. Rob. 65; The Ligo, 2 Hagg. Adm. 356; The Woodrop Sims, 2 Dods. 85; The Comet, 9 Blatchf. 323.

4 The Relief, Olcott, 104; The Fashion *v.* Ward, 6 McLean, 152; Newb. 8. As when two vessels are approaching each other on converging lines, the burden is on the vessel having the wind free—The Clement, 2 Curt. 368; Wheeler *v.* The Eastern State, 2 Curt. 141; The Speed, 2 W. Rob. 225; The Baron Holberg, 3 Hagg. Adm. 244.

5 The Bolina, 3 Notes of C. 210; Amoskeag &c. Co. *v.* The John Adams, 1 Cliff. 412; The Lochlibo, 3 W. Rob. 318.

6 The Rhode Island, Olcott, 512; Treadwell *v.* Joseph, 1 Sum. 390.

7 The Express, Olcott, 268; Foot *v.* Wiswall, 14 Johns. 304.

8 The Bridgeport, 7 Blatchf. 361.

9 The Charlotte Raab, 1 Brown Adm. 454; The Sea Nymph, Lush. 23.

10 The William Young, Olcott, 38; The Neptune, Olcott. 483; The Catherine of Dover, 2 Hagg. Adm. 154; The Ligo, 2 Hagg. Adm. 360. The steamer is not to be absolutely presumed in fault—Dickenson *v.* The Gore, Newb. 45.

11 The Neptune, Olcott, 493; The Catherine of Dover, 2 Hagg. Adm. 145; The Ligo, Ibid. 360.

12 The William Young, Olcott, 38.

13 Waring *v.* Clarke, 5 How. 441; The Emily, Olcott, 132; The Lion, 1 Sprague, 40; Clapp *v.* Young, 6 Law Rep. 111; Bulloch *v.* The Lamar, 8 Law Rep. 275. And see Cushing *v.* The John Fraser, 21 How. 184.

14 The Anita *v.* The Anglo-Norman, Newb. 494; Clapp *v.* Young, 6 Law Rep. 111; The Pacific, Newb. 29.

15 The Lion, 1 Sprague, 40.

16 Waring *v.* Clarke, 5 How. 465; The Hattie Ross, case not reported; Bullock *v.* The Lamar, 8 Law Rep. 275; Foster *v.* The Miranda, Newb. 227; 6 McLean, 221; The Bay State, 3 Blatchf. 48; 18 How. 89.

17 The Washington Irving, Abb. Adm. 336; Seamen *v.* The Crescent City, 1 Bond, 105; Pope *v.* The R. B. Forbes, 1 Cliff. 338; The Oregon *v.* Rocca, 18 How. 570.

18 The Fannie, 11 Wall. 238; Butterfield *v.* Boyd, 4 Blatchf. 356. So, where a steamer collides with an anchored vessel—The City of New York, 8 Blatchf. 194.

19 Hall *v.* Little, 18 Alb. L. J. 153; Skinner *v.* The London &c. Railway, 5 Ex. 786; The Granite State, 3 Wall. 314. And see Culbertson *v.* Shaw, 18 How. 586.

20 The New York *v.* Rea, 18 How. 223; The Clement, 2 Curt. 363; Wakefield *v.* The Governor, 1 Cliff. 93.

21 The Ariadne, 13 Wall. 479; The Louisiana *v.* The Fisher, 21 How. 1; The Genessee Chief, 12 How. 443; Chamberlain *v.* Ward, 21 How. 539.

22 Waring *v.* Clarke, 5 How. 501; The Summit, 2 Curt. 150; The Anna, 6 Ben. 340; The Woodrop Sims, 2 Dods. 83; The Ligo, 2 Hagg. Adm. 356.

23 The Fashion *v.* Ward, 6 McLean, 173; Clapp *v.* Young, 6 Law Rep. 111; Waring *v.* Clarke, 5 How. 465.

24 The Frank Moffatt, 11 Chic. L. N. 114.

§ 388. Liability for damages.—A vessel is liable *in rem* for an injury caused by the neglect of a contractor who had the sole charge of the vessel,[1] and a change of ownership cannot affect the liability of the vessel.[2] It is only when the vessel sued is affirmatively and specifically in fault, either solely or jointly, that she can be condemned in any damages.[3] The mere fact of a collision does not render the vessel liable;[4] and where a fault did not contribute to the collision there can be no recovery,[5] as where a vessel by no voluntary action on her part contributes to the collision,[6] as a vessel while being moored according to the dockmaster's directions, where obedience is exacted under a penalty;[7] but a custom cannot vary an existing liability.[8] The ship that is not disabled is bound to render all possible assistance to the other, although that other may be alone in fault.[9] So, where a vessel is left helpless, the original faulty vessel is liable for a second collision,[10] unless she was without fault in the first collision,[11] and the colliding vessel is liable for towage of the injured vessel,[12] although the injured vessel would have had to be towed part of the way had no collision occurred.[13] A claim for damages for tort exists against a government vessel;[14] and although a vessel be chartered to a foreign government, she is liable *in rem* for a collision caused by the fault of the charterer's agents.[15] A prize ship in charge of a prize crew is liable for an injury caused by a collision.[16] A collision produced by racing is ground for condemnation.[17] The party in fault is to bear his own loss;[18] and if exclusively in fault, he must bear his own loss and compensate the other party for the loss he has sustained.[19] When it is clearly proved that one vessel is the wrong doer, the owners are responsible to the extent of their interest for all damage, actual and consequential.[20] If one vessel is found to have been solely in fault, a decree may be rendered against her alone, although the libel charges the collision to have been caused by the joint negligence of both.[21]

1 The Ruby Queen, Lush. 266. And see Philadelphia &c. Co. *v.* Philadelphia S. T. Co. 23 How. 209.

2 The Bold Buccleugh, 2 Eng. L. & E. 536.

3 The Breeze, 6 Ben. 14.

4 Sturgis *v.* Boyer, 24 How. 124; Kissam *v.* The Albert, 11 Law Rep. N. S. 41; The James Gray *v.* The John Frazer, 21 How. 184.

5 The Manhassett, 6 Ben. 301.

6 Kissam *v.* The Albert, 11 Law Rep. N. S. 41; The Moxey, Abb. Adm. 73.

7 The Broeder Trow, 20 Eng. L. & E. 634; The Bilboa, Lush. 149.

8 The Ellen S. Terry, 7 Ben. 401.

9 The Ericsson, Swabey, 38; The Despatch, Ibid. 138. And see The Celt, 3 Hagg. Adm. 321. See SALVAGE.

10 The Oler, 2 Hughes, 12.

11 The Lincoln, 1 Low. 47; The Annapolis, 1 Lush. 295; The Egyptian, 3 Law. Ti. N. S. 776; Lecombe v. Wood, 2 Mood. & R. 290; The Christiana, 7 Notes of C. 2; 7 Moore, P. C. 160; The Louisiana, 3 Wall. 164; Hammond v. Rodd, 7 Moore, P. C. 160.

12 The Inflexible, Swabey, 200.

13 The Inflexible, Swabey, 200.

14 The Siren, 7 Wall. 152.

15 The Ticonderoga, Swabey, 215.

16 The Siren, 7 Wall. 152.

17 The Spray, 12 Wall. 356.

18 The Scioto, 2 Ware, (Dav.) 353; Reeves v. The Constitution, Gilp. 579; Kelly v. Cunningham, 1 Cal. 365; Innis v. The Senator, Ibid. 456.

19 The Scioto, 2 Ware, (Dav.) 359; S. C. 5 N. Y. Leg. Obs. 443; The Woodrop Sims, 2 Dods. 83; The Sappho, 9 Jur. 560; Reeves v. The Constitution, Gilp. 579; The E. C. Scranton, 2 Ben. 25; The Morgan v. The Zeba, 2 Hughes, 64; The Thames, 5 C. Rob. 345.

20 The Countess of Durham, 9 Mon. Law Mag. 279.

21 The E. C. Scranton, 2 Ben. 30; Sturgis v. Boyer, 24 How. 110; Thorp v. Hammond, 12 Wall. 408.

§ 389. Personal liability.—The liability of the vessel and the responsibility of the owners are convertible terms, and one cannot exist without the other.[1] As a general rule, owners must be held responsible for the fraudulent acts of the master,[2] and for the willful and malicious acts of the master in the course of his employment.[3] Part owners when owners *pro hac vice* are liable personally in case of a collision.[4] The owners of a vessel are liable for a collision caused by the non-observance of the rules of the merchant's shipping act.[5] Whether a party charged ought to be held liable depends upon his relation to the wrong doer.[6] The fact that the negligent vessel was wholly lost does not affect the owner's liability for damages.[7] If a vessel is in ordinary safe trim, although she might have been in handling trim, the owners will not be responsible.[8] The owners of a vessel in Government employ are not liable for damages caused by a collision which occurred in consequence of the positive orders of a commander of the navy.[9] When a party has once made satisfaction for the injury done, he cannot be made liable to another suit at the instance of any merely equitable claimant.[10] Where a loss by collision arises from the negligence of the master and crew, the master is personally responsible; but the ship is primarily responsible, though not exclusively liable for compensation.[11]

1 The Freeman v. Buckingham, 18 How. 189; Fox v. Holt, 4 Ben. 295; Taylor v. Carryl, 20 How. 599; The Edwin v. Naumkeag S. C. Co. 1 Cliff. 330; The Druid, 1 W. Rob. 391; The Bold Buccleugh, 2 Eng. L. & E. 536.

2 The Sampson, 4 Blatchf. 28; The Rebecca, 1 Ware, 188.

3 Ralston v. The State Rights, Crabbe, 46; Fletcher v. Braddick, 2 Bos. & P. N. R. 182; Dean v. Angus, Bee, 369; Reynolds v. Toppan, 15 Mass. 370; The Dundee, 1 Hagg. Adm. 109.

4 Thorp v. Hammond, 12 Wall. 408.

5 The Seine, Swabey, 411.

6 Sturgis v. Boyer, 24 How. 124; The Express, 1 Blatchf. 365; The Quickstep, 9 Wall. 671; Randleson v. Murray, 8 Ad. & E. 108; Quarman v. Burnett, 6 Mees. & W. 499; Milligan v. Wedge, 12 Ad. & E. 737.

7 Barnes v. The Steamship Co. 25 Leg. Int. 196.

8 The Argo, Swabey, 464.

9 Hodgkinson v. Fernie, 2 Com. B. N. S. 415. And see Fletcher v. Braddick, 5 Bos. & P. 182.

10 Newell v. Norton, 3 Wall. 267; The Monticello v. Mollison, 17 How. 152; 1 Low. 184.

11 Hale v. Washington Ins. Co. 2 Story, 176; 2 Sprague, 186; 5 Law Rep. 200; Edwards v. The Stockton, Crabbe, 582; The Rebecca, 1 Ware, 188; The Dundee, 1 Hagg. Adm. 109.

§ 390. Liability when pilot on board.—The fact that the vessel, at the time of the collision, was in charge of a pilot, is no defense if the collision was caused by negligent or unskillful navigation.[1] The master and owners are responsible for the acts of the pilot,[2] and parties are not under the necessity of looking to the pilot for compensation.[3] Although under the tow of a steam tug, a vessel in charge of a licensed pilot is to be considered as navigated by the pilot and not by the tug.[4] The mere fact that a pilot was on board assisting in the management of the vessel, and occasionally giving orders, cannot defeat a recovery when clearly shown that the vessel was not under his orders at the time of the collision.[5] Where the statute contains no clause exempting the vessel or owners from liability for the pilot's mismanagement, the vessel will be liable, though the collision result wholly from the pilot's mismanagement.[6] If the pilot in charge of the ship had not been selected or employed by the owner, but had been received by the master in obedience to a requisition of law, enforced by a penalty, then the owners would not be liable for his misconduct or mismanagement;[7] but it is otherwise if the pilot is employed by the owner not under compulsion of the statute.[8] In England, the rule is that if the pilot is alone in fault, the owners are not liable.[9] The burden is on the owners to show that the pilot was alone in fault, to bring the case within the provisions of the statute.[10] The master of a vessel being

on shore at the time, and the vessel being in charge of the pilot, is not liable for a collision.[11]

1 The Merrimac, 14 Wall. 203; The China, 7 Wall. 57; Camp v. The Marcellus, 1 Cliff. 490; The Alabama and Gamecock, 1 Ben. 499; Hammond v. Rodd, 7 Moore P. C. 169; The Argo, 1 Swabey, 464. But compare Smith v. The Creole, 5 Pa. L. J. 186.

2 The China, 7 Wall. 65; The Carolus, 2 Curt. 71; The Simpson, 3 Wall. Jr. 16; Smith v. The Creole, 2 Wall. Jr. 517; Yates v. Brown, 8 Pick. 23; Williamson v. Price, 4 Mart. 339; The Manhasset, 6 Ben. 201; Smith v. Condry, 1 How. 33, denying Attorney-General v. Case, 3 Price, 302. And see The Lotty, Olcott, 331; Demson v. Seymour, 9 Wend. 1; Camp v. The Marcellus, 1 Cliff. 472; Bussy v. Donaldson, 4 Dall. 206.

3 Camp v. The Marcellus, 1 Cliff. 481.

4 The Lyon, 1 Brown Adm. 61; The Gipsey King, 2 W. Rob. 537.

5 Bussy v. Donaldson, 4 Dall. 206; The Carolus, 2 Curt. 71; Pope v. The R. B. Forbes, 1 Cliff. 348; Smith v. The Creole, 2 Wall. Jr. 485; Smith v. Condry, 1 How. 34; Bean v. The Mayurka, 2 Curt. 72; Camp v. The Marcellus, 1 Cliff. 492; Yates v. Brown, 8 Pick. 23; The China, 7 Wall. 66; Ralston v. The State Rights, Crabbe, 44; The Lotty, Olcott, 331; Fletcher v. Braddick, 2 Bos. & P. N. S. 182; Williamson v. Price, 4 Mart. N. S. 399; Rodrigues v. Melhuish, 28 Eng. L. & E. 474; The Protector, 1 W. Rob. 46; The Neptune, 1 Dods. 467; Haggett v. Montgomery, 5 Bos. & P. 466; Attorney-General v. Case, 3 Price, 302; The Duke of Manchester, 2 W. Rob. 476; The Duke of Sussex, 1 W. Rob. 270.

6 The China, 7 Wall. 63, citing The Girolamo, 3 Hagg. Adm. 169; The Baron Holberg, Ibid. 244; The Gladiator, 3 Hagg. Adm. 340; The Eolides, Ibid. 367, distinguishing The General De Caen, Swabey, 9; The Diana, 1 W. Rob. 131; The Protector, 1 W. Rob. 46; The Christiana, 7 Moore P. C. 169; The Iona, Law Rep. 1 P. C. 426; The Minna, Law Rep. 2 Ad. & E. 97; The Halley, Ibid. 12; and commenting on Smith v. Condry, 1 How. 28; Bussy v. Donaldson, 4 Dall. 206; Williamson v. Price, 4 Mart. N. S. 399; Yates v. Brown, 8 Pick. 23; Dennison v. Seymour, 9 Wend. 1; Smith v. The Creole, 2 Wall. Jr. 514. See *ante*, § 347.

7 The Carolus, 2 Curt. 71; Carruthers v. Sydebotham, 4 Maule & S. 77; The Maria, 1 W. Rob. 95; The Agricola, 2 W. Rob. 10; The Eagle, 8 Wall. 22; Smith v. Condry, 1 How. 28; Camp v. The Marcellus, 1 Cliff. 481; The China, 7 Wall. 53. The English rule is changed—Carruthers v. Sheddon, 6 Taunt. 14; The Druid, 1 W. Rob. 391; The Girolamo, 3 Hagg. Adm. 169; The Eolides, Ibid. 367; The Baron Holberg, Ibid. 244.

8 The Carolus, 2 Curt. 72; Smith v. Condry, 1 How. 28; Yates v. Brown, 8 Pick. 23.

9 McIntosh v. Slade, 6 Barn. & C. 657; The Christiana, 2 Hagg. Adm. 183; The Temora, Lush. 17; Bennett v. Moita, 7 Taunt. 258; 4 Holt. 359; Ritchie v. Bousfield, 7 Taunt. 309; The Protector, 1 W. Rob. 46; The Maria, Ibid. 95; The Duke of Sussex, 1 W. Rob. 270; The Vernon, 1 W. Rob. 317; The Agricola, 2 W. Rob. 10; The Fama, 2 W. Rob. 184; The George, 1 Hagg. Adm. 168; The Batavier, 9 Moore P. C. 287; The Atlas, 5 Notes of C. 62; The Gipsey King, 2 W. Rob. 537.

10 Camp v. The Marcellus, 1 Cliff. 491; Rodrigues v. Melhuish, 28 Eng. L. & E. 475; The Ripon, 6 Notes of C. 245; The Protector, 1 W. Rob. 46; The Diana, 1 W. Rob. 131; Stuart v. Isemonger, 4 Moore P. C. 11; The Christiana, 7 Moore P. C. 171; Hammond v. Rodd, 7 Moore P. C. 169; The Batavier, 9 Moore P. C. 286; The Mobile, 20 Law Rep. 172; The Manchester, 8 Mon. Law Mag. 183; The Carrier Dove, Brown. & L. 113; The Massachusetts, 1 W. Rob. 373; The Mobile, Swabey, 69; The Schwalbe, Lush. 239; Smith v. Condry, 1 How. 34; The Maria, 1 W. Rob. 102. But see Carruthers v. Sheddon, 6 Taunt. 14.

11 Snell v. Rich, 1 Johns. 305.

§ 391. Liability of tug and tow.—Where the officers and crew of the tow, as well as those of the tug, participate in the navigation of the vessels, and a collision with another vessel ensues, the tug alone, or the tow alone, or both jointly, are liable according to their negligence or want of skill;[1] the responsibility is determined by inquiring which vessel was the principal and which the servant.[2] In case of a collision by the tow the tug is also liable;[3] that the tug is alone liable;[4] that both are liable;[5] that the tow was alone liable.[6] If the tow has the full control of her own movements she will be liable for damage inflicted by her collision with another vessel.[7] She will be liable unless she is managed by the use of all possible skill and care;[8] so a tow will be liable where she was the immediate cause of the damage.[9] Where the tug is not in fact at the time under the direction and control of the master and hands on board of the tow, the tow will not be responsible for damage through the fault of the tug.[10] In the absence of directions by or from the pilot on the tow, the tug is bound to keep the tow out of the way of a vessel, and in default the tug is liable.[11] For damage done by the want of ordinary care the tug is responsible.[12] Canal boats and barges in tow are under the control of the tug, and she is liable in case of their collision with other vessels;[13] so when a tug has a raft in tow.[14] That the tug is not liable unless owing to the want of care or skill on her part.[15] The tug is in fault in casting off a barge before she is properly secured to the wharf, and the barge is in fault in not properly providing and handling the lines upon which she relied to stop her headway.[16] A tug whose master acts as pilot and engineer is not properly manned,[17] and must be deemed in fault and liable for a collision;[18] but not for a collision to which the want of a wheelman did not contribute.[19] A tug is in fault for not having lights required by law,[20] and for having the vessel of heaviest draft fast on the tow,[21] and for having the lines fastening a schooner to her side so loose that she would be liable to break away;[22] but if the hawser was furnished by the tow the tug is not liable if it breaks and the tow comes into a collision.[23] The tug is *prima facie* liable when she was bound to know that the schooner must change her course.[24] She is liable for approaching an impediment so near that she could not avoid it;[25] or for attempting to pass a raft in a narrow channel, whereby one of the vessels in tow was grounded;[26] or for loss of a tow drifting away in consequence of being negligently drawn against piles by which the hawser parted;[27] or by neglecting to keep the tow in such position as would ena-

ble her to pass through a narrow passage.[28] Where a tug about to leave her dock through a narrow gap between piers blows her whistle as a signal, and hearing no answer, proceeds outward, and comes into collision with an incoming tug, she is not liable.[29] To make a tug liable, knowledge by or notice to those in charge that they are committing a wrongful act must be shown.[30]

1 The Maria Martin, 12 Wall. 44; Sproule *v.* Hemmingway, 14 Pick. 1; Sturgis *v.* Boyer, 24 How. 121; The Syracuse, 12 Wall. 167; The Frank Moffat, 11 Ch. L. N. 114. See TOWAGE.

2 The Alabama, 1 Ben. 476; The Sampson, 3 Wall. Jr. 14.

3 The R. B. Forbes, 1 Sprague, 328; 1 Cliff. 331; The Rescue, 2 Sprague, 16; Coleman *v.* Foster, 1 Brown Adm. 459; Sproule *v.* Hemmingway, 14 Pick. 1; Sturgis *v.* Boyer, 24 How. 110. *Contra*, Smith *v.* The Creole, 2 Wall. Jr. 485; The Steam Tug Sampson, 3 Am. Law Reg. 337.

4 The James Gray *v.* The John Frazer, 21 How. 184; Sturgis *v.* Boyer, 24 How. 110; The Rescue, 2 Sprague, 16.

5 Sturgis *v.* Boyer, 24 How. 121; Coleman *v.* Foster 1 Brown Adm. 458.

6 Sturgis *v.* Boyer, 24 How. 121; The Hector, 4 Blatchf. 199; Snow *v.* Hill, 20 How. 543; The Express, 1 Blatchf. 365; The Frank Moffat, 11 Ch. L. N. 114.

7 The Express, Olcott, 261; Alexander *v.* Greeve, 7 Hill, 533; The Merrimac, 2 Sawy. 593; Sproule *v.* Hemmingway, 14 Pick. 1.

8 The Express, Olcott, 263; The Duke of Sussex, 2 C. Rob. 270; The Hope, 2 W. Rob. 8. *Contra*, Sproule *v.* Hemmingway, 14 Pick. 1.

9 The Carolus, 2 Curt. 69.

10 The Alabama & Gamecock, 1 Ben. 486; The Express, 1 Blatchf. 365. And see Sturgis *v.* Boyer, 24 How. 110.

11 The U. S. Grant, 7 Ben. 210; The Civilta & Restless, 6 Ben. 309.

12 The Lyon, 1 Brown Adm. 61; Smith *v.* The Creole, 2 Wall. Jr. 512.

13 The John Counter, 18 Law Rep. 553; The Express, 1 Blatchf. 365; The New York *v.* Rea, 18 How. 223; The Quickstep, 9 Wall. 671; The R. W. Burrowes, 7 Blatchf. 374.

14 The W. H. Clark, 5 Biss. 295.

15 The Express, Olcott, 258; Sproule *v.* Hemmingway, 14 Pick. 1; The Frank Moffat, 11 Ch. L. N. 114; The Duke of Sussex, 1 W. Rob. 270; The Duke of Manchester, 2 W. Rob. 470; The Gipsey King, 2 W. Rob. 542.

16 Bowas *v.* Pioneer Tow Line, 2 Sawy. 21.

17 The Armstrong, 1 Brown Adm. 130; The Victor, Ibid. 449; The Coleman, Ibid. 456; The Young America, Ibid. 549.

18 The Coleman, 1 Brown Adm. 456; The Young America, Ibid. 549.

19 The Young America, 1 Brown Adm. 549.

20 The Alabama & Gamecock, 1 Ben. 476.

21 The Zouave, 1 Brown Adm. 449; The Sweepstakes, Ibid. 511.

22 The Northfield, 4 Ben. 112.

23 The Echo, 7 Ben. 70.

24 The D. S. Stetson, 4 Ben. 508.

25 The Austin, 3 Ben. 11.

26 The David Morris, 1 Brown Adm. 273.

27 Cramer v. Allen, 5 Blatchf. 248.

28 The F. M. Wilson, 7 Ben. 367.

29 The E. W. Gorgus, 3 Ben. 572. But see The C. Y. Davenport, 3 Ben. 63.

30 Cutting v. Seabury, 1 Sprague, 522.

§ 392. Obstruction of channel.—If a person wrongfully obstructs a navigable stream, he is liable for the consequences.[1] Any substance sunk in the bottom of a navigable river, so as to create danger, should have a buoy placed over it; a verbal communication is not sufficient notice.[2] It is the duty of the owner of a wreck to use all reasonable means to prevent vessels from running against it.[3] A vessel may obstruct a channel by extending a warp entirely across it; but she must lower the warp on the approach of another vessel, and give notice of the space in which the vessel may pass.[4] A vessel wrongfully or carelessly interposed in the track of another, is liable for an unavoidable collision.[5] So, it is a fault in anchoring in the track of a ferry-boat.[6] Where a steamer was entering a harbor, it was not negligence to run over a seine, when it would have been dangerous to go round it.[7] A pier, erected by the riparian proprietor, without license or authority, is an unlawful obstruction, and subjects the owner to liability for damages to a vessel running against it in the night.[8]

1 Philadelphia &c. Co. v. Philadelphia S. T. Co. 23 How. 209.

2 Hammond v. Pearson, 1 Camp. 515.

3 Brown v. Mallett, 5 Com. B. 599; White v. Crisp, 10 Ex. 312; 26 Eng. L. & E. 532; Hancock v. York &c. Co. 10 Com. B. 348.

4 Potter v. Pettis, 2 R. I. 483; McCord v. The Tiber, 6 Biss. 409; The Vancouver, 2 Sawy. 387.

5 The New Jersey, Olcott, 427; The Woodrop Sims, 2 Dods. 83.

6 The Exchange, 10 Blatchf. 168.

7 The City of Baltimore, 5 Ben. 474; 5 Amer. L. T. 25.

8 Atlee v. Packet Co. 21 Wall. 389.

§ 393. Vessels in motion and vessels at rest.—It is a general rule that on a collision between a vessel under sail and one not under sail, the presumption is that the fault is imputable to the vessel in motion, unless the vessel not under sail was where she should not have been.[1] So where a vessel is lying at a wharf,[2] or is aground;[3] but a vessel unlawfully at the place where she was injured, has no legal right to demand redress;[4] yet a vessel remaining at a place longer than allowed by a city ordinance may still recover.[5] The vessel in motion can excuse herself only by proving the result an inevitable accident.

Nellie, 7 Ben. 497; so of a canal boat moored at a dock—The Monitor, 4 Biss. 503.

9 The State of New York, 3 Ben. 253.

10 Amoskeag M. Co. *v.* The John Adams, 1 Cliff. 413; Knowlton *v.* Sanford, 32 Me. 148; The Batavier, 9 Moore P. C. 287; The Sunnyside, 1 Brown Adm. 227; 91 U. S. 208.

11 The Emelie, 2 Ben. 416.

12 The A. R. Wetmore, 5 Ben. 148; The Bothnia, Lush. 52.

13 The Moxley, Abb. Adm. 73.

§ 394. Limitation of liability.—The owners are limited in their liability for a loss by collision to the amount of their interest in the vessel and freight,[1] to the extent of freight pending and the value of the vessel.[2] The rule of the maritime law, so far as it relates to torts, was intended to be adopted by the act of Congress limiting the liability of owners.[3] The third section of the act of Congress does not limit or affect their liability for loss, damage, or injury resulting through the fault of such vessel to another vessel and her cargo from a collision.[4] Their liability may be discharged by surrendering and assigning to a trustee, for the benefit of the parties injured.[5] In applying the provisions of the act, the tackle, apparel, and furniture must be reckoned as part of the "ship," but not the outfit, such as whaling gear, casks, etc.[6] If the amount paid into court is insufficient, it will be apportioned *pro rata* among the owners of the injured vessel.[7] The owners who load their own vessel are held responsible for freight *ex nomine* in ascertaining the limit of their statute liability.[8]

1 Norwich Co. *v.* Wright, 13 Wall. 104; S. C. 1 Ben. 156; The City of Norwich, 6 Ben. 332; Hale *v.* Washington Ins. Co. 2 Story, 176; The Baltimore, 8 Wall. 385; The Niagara *v.* Cordes, 21 How. 7; The Epsilon, 6 Ben. 378; the English statute distinguished—Cannan *v.* Meaburn, 1 Bing. 243, 465; The Richmond, 3 Hagg. Adm. 431; Brown *v.* Wilkinson, 15 Mees. & W. 391; Dobree *v.* Schroder, 2 Mylne & C. 489; The Mary Caroline, 3 W. Rob. 101; Leycester *v.* Logan, 3 Kay & J. 446; Wilson *v.* Dickson, 2 Barn. & Ald. 2. And see Pope *v.* Nickerson, 3 Story, 492.

2 Allen *v.* Mackay, 1 Sprague, 219; The Ann Caroline, 2 Wall. 549; The Hope, 2 Rob. 8.

3 Norwich Co. *v.* Wright, 13 Wall. 127; Wattson *v.* Marks, 2 Amer. Law Reg. 157.

4 Wright *v.* Norwich & N. Y. T. Co. 8 Blatchf. 28; Cannan *v.* Meaburn, 1 Bing. 243, 465. The Dundee, 1 Hagg. Adm. 109; Wilson *v.* Dickson, 2 Barn. & Ald. 2; Brown *v.* Wilkinson, 15 Mees. & W. 391. And see The Benares, 1 Eng. L. & E. 637; The Richmond, 3 Hagg. Adm. 431; The Dundee, 1 Hagg. Adm. 109; Moore *v.* Amer. T. Co. 24 How. 1. And see, as to statutory construction, Sandiman *v.* Breach, 7 Barn. & C. 96; Ryegate *v.* Wardsboro, 30 Vt. 746; Simonds *v.* Powers, 28 Vt. 354; Dobree *v.* Schroder, 2 Mylne & C. 489; S. C. 6 Sim. 291. And see Rev. Stats. sec. 4283.

5 Norwich Co. *v.* Wright, 13 Wall. 104; 8 Blatchf. 24; Barnes *v.* Steamship Co. 6 Phila. 479, denying Walker *v.* The Boston Ins. Co. 14

Gray, 268. And see Rev. Stats. sec. 4283. Under the English statute, no provision is made for the surrender of the vessel—Norwich Co. *v.* Wright, 13 Wall. 118; Dobree *v.* Schroder, 2 Mylne & C. 489; Brown *v.* Wilkinson, 15 Mees. & W. 391; Wilson *v.* Dickson, 2 Barn. & Ald. 2.

6 Swift *v.* Brownell, 1 Holmes, 467.

7 Norwich Co. *v.* Wright, 13 Wall. 104; The City of Norwich, 1 Ben. 89.

8 The Glaucus, 1 Low. 371; Allen *v.* Mackay, 1 Sprague, 219.

§ 395. Remedy.—In cases of collision, the injured party may proceed *in personam* or *in rem*, or successively in each way, till he has entire satisfaction; but the remedies cannot be blended in one action.[1] The proceedings may be *in rem*, or the lien may be waived, and proceedings *in personam* may be maintained against the master and owners.[2] A suit cannot properly be brought against a vessel *in rem* and her owner *in personam*, unless he is also master.[3] The right to recover for a loss by a collision does not cease by an abandonment to underwriters.[4] The libellant is entitled to the full amount of his damage, notwithstanding he has received partial indemnity from the underwriters,[5] and although the insurance had been paid for a total loss.[6] Damages for injuries from defects of a dock are recoverable, notwithstanding the landing was effected on a Sunday.[7] The owners of the vessel failing to comply with the regulations of the statute may recover half damages, if the other vessel was in fault.[8] A vessel may recover damages if the violation of the law in no way contributed to the collision;[9] so it is no defense to an action by a passenger that he was travelling in violation of a State law.[10] A claim for damages exists against a vessel of the United States guilty of a maritime tort.[11] A suit at common law by one vessel will not prevent a suit in admiralty by the other vessel.[12] Where there are several tows, a fault on the part of one will not prevent a recovery by another.[13] Where one of the colliding steamers was discharged from custody on a stipulation for her value, which was in amount less than one-half of the damages awarded, the libellants could not recover from the other steamer the deficiency.[14] Where the collision was the remote and not the proximate cause of the injury, the party cannot recover.[15] Laches are not imputable to libellant in waiting two years, if the respondent vessel has not changed hands.[16]

1 Citizens' Bank *v.* Nantucket S. B. Co. 2 Story, 58; The Richmond, 3 Hagg. Adm. 431; The Young America, 1 Brown Adm. 466; The Hope, 1 W. Rob. 154; The Volant, 1 W. Rob. 383.

2 The Belfast, 7 Wall. 643; Sturgis *v.* Boyer, 24 How. 110; Chamberlain *v.* Ward, 21 How. 539.

3 The Richard Doane. 2 Ben. 112, discussing Newell *v.* Norton, 3 Wall. 257.

4 Newell *v.* Norton, 3 Wall. 257.

5 The Avon, 18 Int. Rev. Rec. 166.

6 The Metis, 5 Ben. 205; Newell *v.* Norton, 3 Wall. 257; The Monticello *v.* Mollison, 17 How. 152; The Manistee, 7 Biss. 35.

7 Sawyer *v.* Oakman, 7 Blatchf. 290; 1 Low. 134; Philadelphia &c. Co. *v.* Philadelphia S. Co. 23 How. 209. See *ante*, § 351.

8 Chamberlain *v.* Ward, 21 How. 548.

9 The Maverick, 1 Sprague, 23; The Leopard, 2 Ware, (Dav.) 193; Bosworth *v.* Swansey, 10 Met. 363.

10 The D. S. Gregory, 2 Ben. 226; 1 Amer. L. T. 95.

11 The Siren, 7 Wall. 156; The Swallow, 1 Swabey, 30; The Clara, 1 Swabey, 1.

12 The Ann and Mary, 2 W. Rob. 189; Knox *v.* The Ninetta, Crabbe, 534. And see The John and Mary, Swabey, 471.

13 The Morton, 1 Brown Adm. 141; The New Philadelphia, 1 Black, 62.

14 The City of Hartford and The Unit, 11 Blatchf. 290: The Alabama and The Gamecock, 11 Blatchf. 482.

15 The Union, 2 Biss. 18.

16 The Frank Moffat, 11 Ch. L. N. 114.

§ 396. Parties.—The master has authority to bring an action in his own name for damages by collision.[1] Where he is part owner he may represent the insurer's claim for the loss of the cargo, and enforce it *in rem* and *in personam*.[2] The owners of the vessel may bring action for damages without joining the joint owner of the cargo.[3] Where a collision is by the joint act of two, both may be joined as defendants; but if charged with distinct acts, and there is no privity between them, or concert or unity of purpose, they cannot be joined.[4] All the owners of the injured vessel should be joined as libellants.[5] New parties may be added, and parties improperly joined may on motion be stricken out;[6] but this does not authorize the substitution of one sole libellant for another.[7] A party who has stood by during the contest in a case of collision and taken no part in it, cannot share in the proceeds on the sale of the vessel, until the claim of the prosecuting party is satisfied.[8]

1 The Una, 5 Ben. 198; The Commander-in-Chief, 1 Ware, 43; Housman *v.* The North Carolina, 15 Pet. 40; McKinlay *v.* Morrish, 21 How. 343.

2 Newell *v.* Norton, 3 Wall. 257; The Richard Doane, 2 Ben. 112.

3 The Metis, 5 Ben. 206; The Commander-in-Chief, 1 Ware, 43; The Commerce, 1 Black, 574; Newell *v.* Norton, 3 Wall. 257.

4 Atkinson *v.* The R. B. Hamilton, 1 Bond, 536; Fretz *v.* Bull, 12 How. 466; Burke *v.* The M. P. Rich, 1 Cliff. 312; The D. S. Gregory, 2 Ben. 237; The New Philadelphia, 1 Black, 62; Gordon *v.* The Mary J. Vaughan, 2 Ben. 47; 14 Wall. 258; Colegrove *v.* N. Y. & N. H. R. R. Co. 20 N. Y. 492.

5 The Richard Doane, 2 Ben. 113; Bretz *v.* Bull, 12 How. 466.

6 The Commander-in-Chief, 1 Wall. 43.

7 The Detroit, 1 Brown Adm. 145.

8 Woodworth *v.* Insurance Co. 5 Wall. 87; The Saracen, 2 W. Rob. 451; The Clara, Swabey, 1.

§ 397. Rule of damages.—Where the collision is not willful, the general rule of damages that the owner of the injured vessel is to receive is a remuneration which will place him in a situation in which he would have been but for the collision.[1] The actual loss at the time and place of the injury is the measure of damages,[2] and every necessary incident directly connected with the damage becomes part of the actual loss;[3] as the loss consequent on passengers being prevented from going in the boat;[4] salvage expenses and other charges necessarily paid in rescuing the vessel and cargo.[5] In measuring the damages all the direct and immediate consequences are to be considered, as loss of freight, detention, expense, etc.[6] The owners of the vessel injured are entitled to full indemnity,[7] but not for such damage as might have been reasonably avoided by the exercise of ordinary skill and diligence.[8] If the vessel be totally lost the rule of compensation is the market value of the vessel at the time of her destruction,[9] immediately prior to the collision,[10] at the time and place of the loss;[11] what she would have brought in the ordinary course of the sales of vessels,[12] and if sold in a foreign port the value just prior to the collision less the proceeds of the sale,[13] in the currency of the country where the injury occurred, or its equivalent in the country where suit is brought.[14] The rule as to the market value held not to apply where it appears that no such thing as a market price exists.[15] Where an experienced and capable master, in good faith, and upon advice of two other shipmasters, abandoned the vessel and cargo in consequence of the injury by a collision, the value of the vessel and cargo should be taken as a total loss in estimating the damages.[16] Where a vessel was raised and put upon ways, and was found not worth repairing, and was sold at auction, the owner may recover as for a total loss, less the sum for which she was sold, and in addition the cost of raising her and putting her on the ways.[17] The whole value of a vessel and cargo sunk by a collision may be allowed, notwithstanding there was no proof that the libellants had tried to raise her, or that she could not be raised;[18] but not where it appears probable that she could be raised without much expense and be restored to her owner.[19]

1 The Baltimore, 8 Wall. 386; Williamson *v.* Barrett, 13 How. 101; 4 McLean, 589; The Rhode Island, Abb. Adm. 103; The Aleppo, 7 Ben. 125; The Gazelle, 2 W. Rob. 279.

2 Smith *v.* Condry, 1 How. 28; Williamson *v.* Barrett, 13 How. 113; The Aleppo, 7 Ben. 125; The Argus, Olcott, 315; The Dundee, 1 Hagg. Adm. 109; The Gazelle, 2 W. Rob. 279; The Blossom, Olcott, 188; The Narragansett, Olcott, 246; The New Jersey, Olcott, 444.

3 The Rhode Island, Abb. Adm. 102; The Narragansett, Olcott, 388; The Morning Star, 4 Biss. 62; The D. S. Gregory, 2 Ben. 227.

4 Ralston *v.* The State Rights, Crabbe, 22.

5 The Narragansett, Olcott, 388.

6 The Granite State, 3 Wall. 310; The Countess of Durham, 9 Month. Law Mag. 279; The Black Prince, Lush. 573; The Clyde, Swabey, 23; The Pactolus, Ibid. 173; The Inflexible, Ibid. 200.

7 Williamson *v.* Barrett, 13 How. 101; The Aleppo, 7 Ben. 125; Clarke *v.* The Fashion, 2 Ware, (Dav.) 339. And see The Swan, 3 Blatchf. 285.

8 The Baltimore, 8 Wall. 387; The Eliza & Abbey, Blatchf. & H. 441; Reeves *v.* The Constitution, Gilp. 585; The Atlantic & Ogdensburgh, Newb. 144; The Flying Fish, 3 Moore P. C. 86; Brown & L. 436; The Woodrop Sims, 2 Dods. 85; The Lotus, Holt R. R. 181; The Lena, Ibid. 61.

9 The Baltimore, 8 Wall. 386; The New Jersey, Olcott, 415, 444; Williamson *v.* Barett, 13 How. 101; Cramer *v.* Allen, 5 Blatchf. 248; The Joseph D. Dyer, 7 Ben. 395; Meigs *v.* The Northerner, 1 Wall. 682; 1 Wash. T. 91.

10 The Mary Caroline, 3 W. Rob. 101; The Granite State, 3 Wall. 310; The Ann Caroline, 2 Wall. 538; The Baltimore, 8 Wall. 386; The Rebecca, Blatchf. & H. 347; The Colorado, 1 Brown Adm. 412; The Clyde, Swabey, 23; The Iron Master, Ibid. 443; Dobree *v.* Schroder, 2 Mylne & C. 488.

11 Dyer *v.* National S. S. Co. 7 Ben. 395; Cramer *v.* Allen, 5 Blatchf. 249.

12 The Colorado, 1 Brown Adm. 411.

13 The South Sea, Swabey, 114.

14 Cramer *v.* Allen, 5 Blatchf. 248.

15 The Cayuga, 2 Ben. 126.

16 Swift *v.* Brownell, 1 Holmes, 467.

17 The Nebraska, 3 Ben. 261.

18 The Metis, 5 Ben. 203.

19 The Baltimore, 8 Wall. 386; The Columbus, 3 W. Rob. 158; The Empress Eugenie, Lush. 138.

§ 398. Allowance for repairs.—The general measure of damages, where repairs are practicable, is such a sum as will restore the vessel to her former condition.[1] The party is to be put in the same situation as nearly as possible as he would have been had no collision taken place;[2] the actual cost and reasonable expenses of raising and repairing a sunken vessel.[3] Where a vessel is actually sunk, her owner is not bound to go to any expense to raise her;[4] but an item of expense for raising her will be allowed if it does not appear that more was done than was sufficient to enable proof to be given that she could not be repaired without too great expense.[5] Although the sunken vessel is raised and repaired, yet if

there was nothing to show that it was done in bad faith, and the cost with the loss of her use exceeds her value when repaired, her full value at the time of the loss may be allowed.[6] The owners are entitled to full expenses for repairs, although they may make her more valuable than she was before the collision.[7] The rule of insurance of one-third off, new for old, does not apply in collision.[8] If the owner of the injured vessel has repaired with prudence, skill, and diligence, and acting as a wise owner, not insured, the wrong doer may in some extreme cases be liable for even more than the value of the ship, if the excess is made up by an unexpected amount of demurrage;[9] but conjectural damages based upon her serviceability will not be allowed.[10] So, full charges for repairs should not be allowed when the boat was old and somewhat decayed.[11] If the vessel received injuries that could not be repaired, damages are allowed for her impaired value.[12] Regard may be had to the expense and loss incurred by the owner, and the jury must settle the amount.[13]

1 The Cayuga, 14 Wall. 278; 2 Ben. 125; 7 Blatchf. 385; The Baltimore, 8 Wall. 385; The Ann Caroline, 2 Wall. 538; The Isaac Newton, 4 Blatchf. 21; Vantine v. The Lake, 2 Wall. Jr. 52; The Rhode Island, 2 Blatchf. 113; Abb. Adm. 100; The D. S. Gregory, 2 Ben. 227.

2 The Granite State, 3 Wall. 310; The Blossom, Olcott, 188; The New Jersey, Olcott, 415; The Gazelle, 2 W. Rob. 279.

3 The Catharine v. Dickinson, 17 How. 175; Williamson v. Barrett, 13 How. 110; The Nebraska, 3 Ben. 262; The Empress Eugenie, Lush. 138; The D. S. Gregory, 2 Ben. 227; The Monitor and Hill, 3 Biss. 25.

4 The Falcon, 19 Wall. 79; The Columbus, 3 W. Rob. 158.

5 The America, 11 Blatchf. 485.

6 The Bristol, 10 Blatchf. 537. And compare The Russia, 4 Ben. 572.

7 The Santee, 6 Blatchf. 1; The Pactolus, Swabey, 173; The Baltimore, 8 Wall. 386; The Clyde, Swabey, 23; The Catharine v. Dickinson, 17 How. 170.

8 The Baltimore, 8 Wall. 386; The Catharine v. Dickinson, 17 How. 170; The Clyde, Swabey, 23; The Pactolus, Swabey, 173; The Gazelle, 2 W. Rob. 270; 8 Jur. 429; The Nautilus, Ware, 529; Williamson v. Barrett, 13 How. 101; The Isaac Newton, 4 Blatchf. 21.

9 The Glaucus, 1 Low. 372, distinguishing the Empress Eugenie, Lush. 138.

10 Petty v. Merrill, 9 Blatchf. 447; 12 Blatchf. 11; The Isaac Newton, Abb. Adm. 11; The St. John, 7 Blatchf. 220; 2 Ben. 192; The Favorita, 8 Blatchf. 539.

11 The W. H. Clark, 5 Biss. 310; The Rhode Island, 1 Blatchf. 363; Olcott, 505.

12 Atchison v. The Dr. Franklin, 14 Mo. 63; The Blossom, Olcott, 194.

13 Moorsom v. Bell, 2 Camp. 616; The Rhode Island, Abb. Adm. 104.

The Cayuga, 2 Ben. 125; 7 Blatchf. 385; 14 Wall. 270; Jolly *v.* Terre Haute D. B. Co. 6 McLean, 237; Williamson *v.* Barrett, 13 How. 101; Barrett *v.* Williamson, 4 McLean, 589. But see The Rhode Island, Abb. Adm. 103; Sidney *v.* Condry, 1 How. 28; Blanchard *v.* Ely, 21 Wend. 349; The Gazelle, 2 W. Rob. 515; The Apollo, 9 Wheat. 362.

4 The Stormless, 1 Low. 153.

5 The Mayflower, 1 Brown, 380, commenting on and explaining Smith *v.* Condry, 1 How. 28; Williamson *v.* Barrett, 13 How. 101; The Aleppo, 7 Ben. 128; The Gazelle, 2 W. Rob. 279; The Clarence, 3 W. Rob. 283; Sturgis *v.* Clough, 1 Wall. 269.

6 The Transit, 4 Ben. 138; The Emilie, Ibid. 235; The Cayuga, 7 Blatchf. 385.

7 Swift *v.* Brownell, 1 Holmes, 467.

8 The Walter W. Pharo, 1 Low. 437.

9 The Transit, 4 Ben. 138; The Cayuga, 2 Ben. 125.

10 The Transit, 4 Ben. 138; The Emilie, Ibid. 235.

11 The Favorita, 8 Blatchf. 543; The Cayuga, 7 Blatchf. 385; 14 Wall. 270; The Mayflower, 5 Am. L. T. 367; The Transit, 4 Ben. 138; The Cayuga, 7 Blatchf. 385.

12 The Favorita, 4 Ben. 134; The Cayuga, 2 Ben. 125; 7 Blatchf. 385; 14 Wall. 270; The Sunnyside, 1 Brown Adm. 415.

13 The W. H. Clark, 5 Biss. 310; Williamson *v.* Barrett, 13 How. 101; The R. L. Mabey, 4 Blatchf. 440.

14 The Hermann, 4 Blatchf. 442; Williamson *v.* Barrett, 13 How. 101.

15 The Baltic, 3 Ben. 197; Williamson *v.* Barrett, 13 How. 101.

16 The Stormless, 1 Low. 153.

17 The Morning Light, 4 Biss. 62.

18 Vantine *v.* The Lake, 2 Wall. Jr. 52.

19 Vantine *v.* The Lake, 2 Wall. Jr. 52.

20 The Narragansett, 1 Blatchf. 211; Vantine *v.* The Lake, 2 Wall. Jr. 52.

21 The Sunnyside, 1 Brown Adm. 415.

22 Hobson *v.* Lord, 92 U. S. 397.

23 The Columbus, 3 W. Rob. 158; The Empress Eugenie, Lush. 138; The Inflexible, Swab. 32.

§ 400. Allowance of interest.—On damages sustained by a collision, interest should be allowed from the day on which the injury happened to the day when judgment is rendered for them,[1] upon the value of the vessel for the time she is undergoing repairs,[2] on the sum paid for repairs.[3] The allowance of interest is a matter of discretion.[4] It ought to be at a uniform rate, and not varying with the laws of the several States.[5]

1 The Morning Star, 4 Biss. 62; The America, 11 Blatchf. 485.

2 The Rhode Island, Abb. Adm. 100.

3 The Baltic, 3 Ben. 195; The Baltic, 3 Ben. 197; Adams *v.* The Ocean Queen, 5 Blatchf. 493.

4 The Aleppo, 7 Ben. 136; Egbert *v.* Baltimore &c. R. R. Co. 2 Ben. 223; Allen *v.* Mackay, 1 Sprague, 219; Lincoln *v.* Claflin, 7 Wall. 132.

5 Hemmenway *v.* Fisher, 20 How. 255; The Aleppo, 7 Ben. 136.

§ 401. Allowance for loss or damage to cargo. The owners of a vessel wrongfully injured by a collision may recover for injury done to the cargo,[1] to its full value if totally lost,[2] the value to be estimated from the value at the port of shipment, including expenses of transportation to the place of collision, the lading of the cargo, etc., and interest at six per cent. per annum,[3] the value of the cargo at the market price at the home port of the injured vessel at the time it would ordinarily have arrived there,[4] its value at the time and place of shipment, without including loss of profits which would have been realized by completing the voyage.[5] Future profits may be allowed as damages, but speculative and merely possible profits cannot be allowed.[6] The damage should be ascertained by a proper examination and appraisal, or by a sale, upon notice to respondents.[7] A loss not directly attributable to the collision, but to an error of judgment on sale of the goods, should not be included.[8] When the owner of a cargo expects to recover damages for injury thereto, it is improper for him to sell the goods at private sale, and without notice to the party to be charged.[9] Where damages are recovered for the loss of cargo, they may properly include an allowance in the nature of freight for the voyage as far as performed,[10] and which the vessel was earning at the time, deducting expenses,[11] or the amount of freight paid to a substituted vessel.[12] The owners of the colliding vessel will not be liable for the loss of goods by a collision unless they are to blame.[13]

1 The Commerce, 1 Black, 574; The Commander-in-Chief, 1 Wall. 43.

2 The Narragansett, Olcott, 255; The Russia, 3 Ben. 479; The Commander-in-Chief, 11 Wall. 43.

3 The Monticello *v.* Mollison, 17 How. 152; The Glaucus, 1 Low. 371; The Aleppo, 7 Ben. 125; The Anna Maria, 2 Wheat. 327; Adams *v.* The Ocean Queen, 7 Blatchf. 494; Smith *v.* Condry, 1 How. 28; The Lively, 1 Gall. 315; Seaman *v.* The Crescent City, 1 Bond, 113; The Mary J. Vaughan, 2 Ben. 50; 14 Wall. 258, explaining The Russia, 3 Ben. 471; 4 Ibid. 572. Interest on value of cargo—The Apollon, 9 Wheat. 362; The Anna Catharina, 6 C. Rob. 10.

4 Swift *v.* Brownell, 1 Holmes, 467; The Joshua Barker, Abb. Adm. 215.

5 The Mary J. Vaughan, 2 Ben. 47; Smith *v.* Condry, 17 Pet. 20; 1 How. 28.

6 The Mayflower, 1 Brown Adm. 387; Lacour *v.* The Mayor &c. 3 Duer, 406; St. John *v.* The Mayor &c. 6 Duer, 315; Walter *v.* Post, 6 Duer, 363; Allison *v.* Chandler, 11 Mich. 542; Sewall's Falls Bridge *v.* Fisk, 23 N. H. 171; Griffen *v.* Colver, 16 N. Y. 489.

7 The Thomas Kiley, 3 Ben. 228.

8 Seaman v. The Crescent City, 1 Bond, 105.

9 The Thomas Kiley, 3 Ben. 228.

10 The Glaucus, 1 Low. 366; The Baltimore, 8 Wall. 385; Tindall v. Bell, 11 Mees. & W. 228; The Ann Caroline, 2 Wall. 538; The Rebecca, Blatchf. & H. 347; The New Jersey, Olcott, 444; The Cayuga, 14 Wall. 278; 1 Ben. 171; 7 Blatchf. 385; The Heroine, 1 Ben. 226; Williamson v. Barrett, 13 How. 101; Egbert v. Baltimore &c. Co. 2 Ben. 225; The Rhode Island, Abb. Adm. 104; The Gazelle, 2 W. Rob. 279; The Canada, Lush. 586; Yates v. Whyte, 4 Bing. (N. C.) 272; Jones v. Whyte, 2 Jur. 303; The Eolides, 3 Hagg. Adm. 367.

11 Williamson v. Barrett, 13 How. 101; 4 McLean, 589.

12 The Yorkshireman, 2 Hagg. Adm. 30, note.

13 The New Jersey, Olcott, 448; Crosby v. Fitch, 12 Conn. 410; Williamson v. Grant, 1 Conn. 487.

§ 402. Exemplary damages.—If a vessel be not purposely run into, compensatory damages only are allowed, to enable the owners to put her in as good order as before; but no allowance is to be made for supposed profits.[1] In general, damages for collision should not include expectant profits; but when the collision is intentional and malicious, they may be allowed as exemplary damages.[2] If a boat is purposely run into, vindictive damages may be given.[3] In the case of a willful and malicious collision, damages may be above the amount of the actual injury.[4] Legal design is imputable where the consequences necessarily flow from the acts of the parties.[5] Where in a collision a skiff was injured, and libellant seriously maimed, so as to partially disable him for life, and his son was drowned, the court allowed as damages the cost of repairs to the skiff, compensation for loss of its use, cost of cure of libellant, and a sum of money as compensation for his sufferings, wages which himself and son could have earned up to time of decree, and compensation for his permanent disability in a present amount, representing the income of his ordinary labor for one-third of his expectation of life, according to the mortality tables.[6]

1 Steamboat Co. v. Whilldin, 4 Harring. 228; The Narragansett, Olcott, 246; The Lotty, Olcott, 329; Myers v. Perry, 1 La. An. 372; Cummins v. Spruance, 4 Harring. 315.

2 The Newhall, 3 Ware, 105.

3 Steamboat Co. v. Whillden, 4 Harring. 228.

4 Ralston v. The State Rights, Crabbe, 22. And see Waring v. Clarke, 5 How. 441; New Jersey S. N. Co. v. Merchants' Bank, 6 How. 435; Smith v. Condry, 1 How. 28.

5 Catlin v. Springfield Ins. Co. 1 Sum. 446, distinguishing Percival v. Hickey, 18 Johns. 257; Scott v. Shepherd, 2 W. Black. 892.

6 Miller v. The W. G. Hewes, 1 Woods, 363.

§ 403. Loss, when divided.—The loss will be divided in three cases: first, when there is no fault on either side; second, when the fault is inscrutable; and third, when both vessels are in fault.[1] Where there is no fault on either side,[2] or if it cannot be ascertained where the fault lies, the damages will be divided.[3] Where the evidence on both sides is conflicting and nicely balanced, the court will be guided by the probabilities of the respective cases set forth, and damages be divided.[4] Where there is reasonable doubt as to which party is to blame, the loss must be sustained by the one on whom it has fallen.[5] Where both parties are in fault the loss will be divided,[6] although one may be much more in fault than the other,[7] unless it appears that there was a great disparity of fault,[8] or they will be apportioned in some other more appropriate rate, looking to the facts;[9] but the doctrine of apportionment where there is mutual fault cannot apply against a third vessel.[10] The maritime law departs from the natural law and the common law, that, where there are mutual faults, neither party has a remedy upon the other.[11] Where the propeller had not a proper lookout, and the schooner had no light, the steamer had no right to demand that the damages should be divided in a case of collision, as where both were in fault.[12] Where a collision occurs by the willful fault or intentional wrong of both parties, the damages will not be apportioned, but the libel will be dismissed.[13] So, where the libellant was guilty of gross fault, and that of respondent in any degree doubtful, the damages will not be divided.[14] Where the damages were caused by running against a pier, and both were in fault, the land-owner for creating an unlawful obstruction, and the vessel because her pilot was ignorant or negligent, the damages should be divided.[15] Where a tug and tow constituted one party, and a propeller the other, and all three in fault, the damages were divided equally between all.[16] But this rule is applicable only where both vessels were injured,[17] it does not apply to the loss of cargo in the tow by collision with another tow by the mutual fault of the respective tugs.[18]

1 The Fanny Fern and the Swann, Newb. 168; The Scioto, 2 Ware, (Dav.) 359; 11 Law Rep. 16; 5 N. Y. Leg. Obs. 442; O'Neil *v.* Sears, 14 Law Rep. N. S. 731; The Marcia Tribou, 2 Sprague, 17.

2 Waring *v.* Clarke, 5 How. 441; Smith *v.* Condry, 1 How. 28; The Dundee, 1 Hagg. Adm. 109; 5 Barn. & C. 156; if neither was in fault the loss must be borne by him on whom it falls—Stainback *v.* Rae, 14 How. 532; Sturgis *v.* Boyer, 24 How. 125; Union S. S. Co. *v.* N. Y. &c. Co. 24 How. 313; The Morning Light, 2 Wall. 553; The James Gray *v.* The John Frazer, 21 How. 184; The Continental, 14 Wall. 355; The Pennsylvania, 24 How. 307; The Eliza & Abby, Blatchf. & H. 441; The Lady Pike, 2 Biss. 144; Killam *v.* The Erl, 3 Cliff. 459; The Shannon, 1 W. Rob. 463;

against one alone will not deprive the injured vessel of her rights.[7] The action may be against one of the vessels and one-half of the loss decreed against her, or both vessels may be joined in one action,[8] and the damages be apportioned between them.[9] The owner of the cargo injured, in a proceeding against one vessel, may recover to the limit of one-half the amount of the injury.[10] Where a vessel was injured by the joint negligence of another vessel and a tug, the mast of the injured vessel having stood the remainder of the season, the expense of a new mast the next winter could not be recovered.[11]

1 The D. S. Gregory, 2 Ben. 226; S. C. 1 Am. L. T. 95; The Monitor & Hill, 3 Biss. 25.

2 The New Philadelphia, 1 Black, 62; The Atlas, 4 Ben. 35; The Friends, 4 Moore P. C. 222; The Washington and Gregory, 9 Wall. 516.

3 The City of Hartford and The Saints, 11 Blatchf. 294, explaining The Washington and The Gregory, 9 Wall. 513. And see the Milan, Lush. 388; The Atlas, 4 Ben. 27; 10 Blatchf. 459; The Alabama and Game Cock, 10 Blatchf. 484; S. C. 92 U. S. 695.

4 The Atlas, 4 Ben. 33; The Catharine *v.* Dickinson, 17 How. 170; The Carl Julian, 1 Hagg. Adm. 113; The Dundee, 1 Hagg. Adm. 109.

5 The Atlas, 4 Ben. 37; The Scioto, 2 Ware (Dav.) 359; The D. S. Gregory, 2 Ben. 166; 6 Blatchf. 166; The Queen's County, 6 Ben. 146.

6 The Atlas, 4 Ben. 37; The Carl Julian, 1 Hagg. Adm. 113; The Dundee, 1 Hagg. Adm. 109.

7 The Atlas, 10 Blatchf. 467; S. C. 4 Ben. 27, explaining the Washington and Gregory, 9 Wall. 513; The Milan, 1 Lush. 388; The Bay State, 3 Blatchf. 48; 18 How. 89.

8 The Atlas, 4 Ben. 36; The Commander-in-Chief, 1 Wall. 43; The Dundee, 1 Hagg. Adm. 109; Sturgis *v.* Boyer, 24 How. 110; The New Philadelphia, 1 Blatchf. 62; The Hanover, 4 Ben. 40.

9 The Atlas, 4 Ben. 37; Lucas *v.* The Thomas Swann, 6 McLean, 282; Newb. 158.

10 Phœnix Ins. Co. *v.* The Atlas, 4 Ben. 41; S. C. 10 Blatchf. 459; 3 Am. L. T. 89; The Milan, Lush. 388.

11 Prinderville *v.* The Monitor, 14 Int. Rev. Rec. 70.

§ 405. Lien for damages.—The owner of the injured vessel has a lien on the offending vessel for the damages, equal in rank to the liens of material-men, bottomry, and others;[1] which it carries with it into whosesoever hands it may come.[2] It is not divested by removal of the vessel into another jurisdiction,[3] nor by sale of the vessel.[4] It is inchoate, and must be perfected by subsequent proceedings,[5] and is lost by laches and other circumstances [6] but it lasts long enough to give the party a reasonable opportunity to enforce it.[7] There is no lien in favor of the injured vessel on the cargo of the offending vessel,[8] but there is a lien on the freight.[9] The seamen's lien postponed to lien for collision under the law of retaliation.[10]

1 The America, 6 Law Rep. N. S. 264; S. C. 2 West. L. M. 279; The Rock Island Bridge Co. 6 Wall. 213; Edwards *v.* The R. F. Stockton, Crabbe, 580; The Bold Buccleugh, 3 W. Rob. 220; 2 Eng. L. & E. 536. But see The Volant, 1 W. Rob. 383. And see Harmer *v.* Bell, 7 Moore P. C. 267; 22 Eng. L. & E. 62; The Europa, Brown. & L. 87; 2 Eng. L. & E. 557. As to priority, see Rusk *v.* The Freestone, 2 Bond, 235.

2 The Avon, 1 Brown Adm. 170; The China, 7 Wall. 68; The Lion, Law Rep. 2 Ad. & E. 102; Edwards *v.* The R. F. Stockton, Crabbe, 580; The America, 16 Law Rep. 264; The Amalia, Brown. & L. 151; The Bold Buccleugh, 3 W. Rob. 220; The Alabama, 1 Ben. 476. And see The Zollverein, Swabey, 96; The Gazelle, 2 W. Rob. 279; Schuyler *v.* The Corsica, 37 How. Pr. 262.

3 The Avon, 1 Brown Adm. 170. And see The Zollverein, Swabey, 96.

4 The Avon, 1 Brown Adm. 180; The Zollverein, Swabey, 96; The Genessee Chief, 12 How. 443. It follows proceeds on sale of wreck—Flaherty *v.* Doane, 1 Low. 151; The Clara, 1 Swabey, 1.

5 The China, 7 Wall. 68; The Lion, Law Rep. 2 Ad. & E. 102; The America, 16 Law Rep. 264; Edwards *v.* The R. F. Stockton, Crabbe, 580; The Bold Buccleugh, 3 W. Rob. 220.

6 The China, 7 Wall. 68; The America, 16 Law Rep. 264; Edwards *v.* The R. F. Stockton, Crabbe, 580; a libel filed four years after the collision deemed too late—The D. M. French, 1 Low. 43. See *ante*, § 84.

7 The Europa, Brown. & L. 89; four years and intervening sale defeats the lien—The D. M. French, 1 Low. 43; twenty months deemed sufficient—The Admiral, 18 Law Rep. 91.

8 The Victor, Lush. 72; The Flora, Law Rep. 1 Adm. 45.

9 The Leo, Lush. 444.

10 The Enterprise, 1 Low. 455; The Linda Flor, Swabey, 309; The Duna, 13 Irish Jur. 358; The Bewares, 7 Notes of C. 538; 1 Eng. L. & E. 637.

§ 406. Costs.—The party who fails in any suit, except under peculiar circumstances, should pay the whole of the costs.[1] Where both vessels were in fault, each should pay its own costs,[2] or the costs should be divided,[3] or refused to either.[4] Where neither was to blame, each should bear its own costs.[5] Where damage occurs by inevitable accident, no costs are allowed;[6] but the power to award costs in such cases is in the discretion of the court.[7] Where both are in fault, the vessel most in fault bears all the costs.[8] Though a vessel was not in fault, yet if she did not render assistance after the collision, she would be liable for the costs.[9] Where a libel is dismissed the respondent is entitled to costs.[10] Where an action was brought without cause, the party bringing it should pay his own costs.[11] Where the crew of the vessel not in fault were guilty of gross violence, costs were denied.[12] Costs and expenses paid in defending a suit for services in keeping an injured vessel afloat are not recoverable where both vessels were in fault.[13] If the damage is slight, and there is a remedy in a common-law court, no cost will be awarded.[14] The owners of a vessel assisted by salvors are not obliged to make a tender of the amount due, but may re-

cover the costs of defending the salvage suit from the colliding vessel.[15] Where neither vessels are culpable, each must pay his own costs.[16] Where a vessel deserted the injured vessel without cause, costs were awarded as a punishment.[17] Where neither party recovered to the extent of their claim, costs were not allowed.[18] Counsel fees beyond the costs and fees allowed by statute were refused.[19]

1 The Christina, 8 Jur. 321.

2 Hay *v.* Le Neve, 2 Shaw, Scotch App. 395; The De Cock, 5 Month. Law Mag. 303; 2 Law Rep. 311; The Monarch, 1 W. Rob. 21; Foster *v.* The Miranda, Newb. 227; 6 McLean, 221; The Columbus, Abb. Adm. 390; The Washington, 5 Jur. 1067; 2 Mar. L. C. 23. And see the Montreal, 24 Eng. L. & E. 580.

3 Lenox *v.* The Winisimmet Co. 1 Sprague, 160.

4 The Favorita, 8 Blatchf. 539.

5 The Shannon and Placidia, 7 Jur. 380; The Columbus, Abb. Adm. 364.

6 The Itinerant, 8 Jur. 132; 2 W. Rob. 236; The Ebenezer, 2 W. Rob. 206; The Margaret, 1 Law Ti. N. S. 340.

7 The Sapphire, 18 Wall. 51; The London, Brown. & L. 82; De Vaux *v.* Salvador, 11 Ad. & E. 420; The Rival, 1 Sprague, 130.

8 The Rival, 1 Sprague, 130; The Columbus, Abb. Adm. 390; The Celt, 3 Hagg. Adm. 321; The Monarch, 1 W. Rob. 21; Reeves *v.* The Constitution, Gilp. 579; The Scioto, 2 Ware, (Dav.) 359; The Debock, 5 Mon. Law Mag. 303.

9 The Celt, 3 Hagg. Adm. 321.

10 The Catherine of Dover, 2 Hagg. Adm. 145. But see The Scioto, 2 Ware, (Dav.) 359; The George, 2 W. Rob. 386; 9 Jur. 670; 4 Notes of C. 161.

11 The Thornley, 7 Jur. 659.

12 The Catalina, 2 Spinks, 23.

13 The Favorita, 4 Ben. 132.

14 The Boston, Olcott, 407.

15 The Legatus, Swabey, 168. But see Tindall *v.* Bell, 11 Mees. & W. 228.

16 The Columbus, 3 W. Rob. 158; The Washington, 5 Jur. 1067; The Baltimore, 8 Wall. 388.

17 The Atlas, 4 Ben. 33; The Celt, 3 Hagg. Adm. 321; The Caledonia, Spinks, 23; The St. Lawrence, 7 Notes of C. 556.

18 The David Morris, 1 Brown Adm. 273.

19 Oelrichs *v.* Spain, 15 Wall. 230; The Baltimore, 8 Wall. 377; Flanders *v.* Tweed, 15 Wall. 453.

14 The Hoop, 1 C. Rob. 196.

15 Conn v. Penn, Pet. C. C. 496.

16 The Rapid, 8 Cranch, 155; The Julia, Ibid. 181; The Sally, Ibid. 382; Scholefield v. Eichelberger, 7 Pet. 586; The Hoop, 1 C. Rob. 165.

17 Planters' Bank v. St. John, 1 Woods, 589; U. S. v. Lane, 8 Wall. 185; Griswold v. Waddington, 16 Johns. 438; The Ouachita Cotton, 6 Wall. 521.

§ 408. Rights of belligerents.—A belligerent may lawfully purchase goods or vessels of a neutral; the locality of the objects purchased does not vitiate the transaction.[1] The rights of Government in subduing an insurrection are the same as if hostilities were carried on between independent nations.[2] The Government sustained the double character of belligerent and sovereign, and had the rights of both;[3] it was clothed with all the rights conferred by international law upon separate nationalities in a state of public hostility.[4] War gives the sovereign the right to take persons and confiscate property of the enemy wherever found.[5] Rebels are at the same time belligerents and traitors.[6] In case of rebellion or civil war, each party is a belligerent,[7] and those in revolt will be treated as belligerents.[8] A belligerent may arrest a neutral vessel on the high seas for any breach of neutrality.[9]

1 Hooper v. The Hiram, Fish Pr. 84; The Dree Gebroeders, 4 C. Rob. 232.

2 Rose v. Himely, 4 Cranch, 241; Hudson v. Guestier, 4 Cranch, 293; The Santissima Trinidad, 7 Wheat. 283; The Hiawatha, Blatchf. Pr. 10.

3 Prize Cases, 2 Black, 673; Rose v. Himely, 4 Cranch, 241; Miller v. U. S. 11 Wall. 307; The Amy Warwick, 2 Sprague, 123, 143; Cheriot v. Foussat, 3 Binn. 220; Dobree v. Napier, 3 Scott, 201; The Santissima Trinidad, 7 Wheat. 283; U. S. v. Palmer, 3 Wheat. 610; Semmes v. City F. Ins. Co. 6 Blatchf. 453; The Hiawatha, Blatchf. Pr. 10; Hudson v. Guestier, 4 Cranch, 293; The Sarah Star, Blatchf. Pr. 83.

4 The Sally Magee, Blatchf. Pr. 384; The Mary Clinton, Blatchf. Pr. 558; The Hiawatha, 2 Black. 635.

5 Miller v. U. S. 11 Wheat. 316; Brown v. U. S. 8 Cranch, 109. But war gives no right to capture the goods of a friend—U. S. v. The Telegrafo, Newb. 383.

6 The Amy Warwick, 2 Sprague, 123; 14 Law Rep. N. S. 335. And see The Lilla, 15 Ibid. 81; 2 Sprague, 177; The Chapman, 4 Sawy. 513; U. S. v. Palmer, 3 Wheat. 610; The Divina Pastora, 4 Wheat. 52; The Santissima Trinidad, 7 Wheat. 283; The Hiawatha, Blatchf. Pr. 10.

7 Prize Cases, 2 Black, 669; The Santissima Trinidad, 7 Wheat. 283; Coppell v. Hall, 7 Wheat. 554; Mrs. Alexander's Cotton, 2 Wheat. 404.

8 Dole v. New England M. M. Ins. Co. 2 Cliff. 427; The Santissima Trinidad, 7 Wheat. 283; U. S. v. The Malek Adhel, 2 How. 210; The Lilla, 2 Sprague, 186; The Amy Warwick, 2 Sprague, 122.

9 U. S. v. Peters, 3 Dall. 121.

§ 409. Visitation and search.—The right of visitation and search of merchant vessels on the high seas is an incontestable right of the lawful commanders of cruisers of a belligerent nation.[1] The commander may chase, but under no circumstances may fire, under false colors.[2] If a neutral is stopped on the high seas for search, he must act candidly and deliver the ship's papers and dispatches, but concealment and *mala fide* conduct will subject him to the penalties inflicted by the law of nations.[3] Deception as to the master may attach to any official papers or to letters of instructions.[4] The refusal of a master to permit the papers to be carried on board the cruiser for examination, is a resistance to the right of visitation and search, even though he offers to let them examine them on his own vessel and permits his vessel to be searched.[5] The captain of a merchant steamer, when brought to by a war vessel, is not privileged by the fact that he has a Government mail on board, from sending his papers on board, if required for examination.[6] The right of search may be made effective by examination of the lading as well as the papers of the vessel, restrained within the limits of a fair and reasonable reserve;[7] and a resistance on the part of the master will be held conclusive on the neutral cargo.[8] Accepting a foreign convoy is such a resistance as might compromise the neutral character of the property.[9] If the visiting officer finds on board any ship's papers relative to another vessel already captured, but not adjudicated upon, he will take possession of them and forward them to the port to which such other vessel has been sent in for adjudication.[10]

1 The Peterhoff, Blatchf. Pr. 534; The Maria, 1 C. Rob. 340; The Nereide, 9 Cranch, 388; The Anna Maria, 2 Wheat. 327; The Eleanor, 2 Wheat. 345; The Marianna Flora, 11 Wheat. 1; U. S. v. La Jeune Eugenie, 2 Mason, 409; The Apollon, 9 Wheat. 362; Bas v. Tingy, 4 Dall. 37; Miller v. The Resolution, 2 Dall. 19. And this right carries with it all the means essential to its exercise—The Eleanor, 2 Wheat. 345; but national vessels are not subject to the right of search—The Eleanor, 2 Wheat. 345.

2 The Peacock, 4 C. Rob. 188.

3 U. S. v. The Tulip, Fish Pr. 26; The Atalanta, 6 C. Rob. 440; The Stephen Hart, Blatchf. Pr. 426; The Concordia, 1 C. Rob. 100.

4 U. S. v. The Lilla, 2 Cliff. 185; The Flying Fish, 2 Gall. 375.

5 The Peterhoff, 5 Wall. 28; Blatchf. Pr. 463.

6 The Peterhoff, 5 Wall. 28; Blatchf. Pr. 463.

7 The Springbok, Blatchf. Pr. 352; The Maria, 1 C. Rob. 340; The Liverpool Packet, 1 Gall. 519; The Oster Risoer, 4 C. Rob. 199.

8 The Nereide, 9 Cranch, 450; The Elsebe, 5 C. Rob. 155; The Maria, 1 C. Rob. 340.

9 The Joseph, 1 Gall. 548; The Maria, 1 C. Rob. 340.

10 The Romeo, 6 C. Rob. 351; The Maria, 1 C. Rob. 340.

§ 410. Detention.—The commander should detain a vessel which carries false or simulated papers;[1] or where the master and crew have been guilty of spoliation of papers;[2] or if important papers are wanting, or are inconsistent with each other, or with the master's statements;[3] or if the real nationality differs from that indicated by the official voucher.[4] The absence of the official voucher, unexplained, is good cause for detention.[5] If the quantity of goods on board the vessel does not exceed that which may be required for her use, whatever be their character, the vessel is not to be detained.[6] The vessel should not be detained unless the contraband goods are found actually on board.[7] But if on a return voyage the commander ascertains that contraband goods were carried on the outward voyage, with simulated papers, he should detain her,[8] and the non-purchase of a return cargo makes no difference.[9] The origin of the property will, in proper cases, be ascertained by an examination, notwithstanding the formal description in the ship's papers.[10] Vessels actually engaged in cartel service are exempt from detention;[11] but sailing under a flag of truce, or under the flags of both nations at the same time, is not evidence of cartel service.[12] So, a vessel professedly going to seek employment in the cartel service is not considered a cartel vessel.[13] Cartel vessels are not at liberty to carry cargo or dispatches, and if they do, are liable to detention.[14] In case of previous seizure the commander should use special precaution; but if he is nevertheless satisfied that there is probable cause, he should detain her.[15] As soon as the commander has come to the determination to detain the vessel, he should give notice to the master, and may state to him the ground on which the detention is made.[16] He should then secure possession of the vessel, and if by reason of the weather it is impracticable, should require the vessel to lower her flag, and steer according to orders.[17]

1 The Sarah, 3 C. Rob. 330.

2 The Hunter, 1 Dods. 480; The Two Brothers, 1 C. Rob. 132.

3 The Anna, 5 C. Rob. 383; Nostra Signora de Piedade Nova Aurora, 6 C. Rob. 43.

4 The Fortuna, 1 Dods. 87; The Success, Ibid. 132; The Neptune, Spinks, 286.

5 The Caroline, Spinks, 252.

6 The Richmond, 5 C. Rob. 325.

7 The Imina, 3 C. Rob. 168; The Frederick Molke, 1 C. Rob. 87.

8 The Margaret, 1 Act. 333; The Baltic, Ibid. 25; Carrington v. Merchant's Ins. Co. 8 Peters, 521; The Rosalie and Betty, 2 C. Rob. 349; The Nancy, 3 Ibid. 122.

9 The Margaret, 1 Act. 333.

10 The Liverpool Packet, 1 Gall. 520; The Potrimpos, cited in 4 C. Rob. 214.

11 The Dalfjie, 3 C. Rob. 142; La Gloire, 5 C. Rob. 193.

12 La Gloire, 5 C. Rob. 198.

13 The Dalfjie, 3 C. Rob. 142.

14 The Venus, 4 C. Rob. 355; La Rosine, 2 C. Rob. 372.

15 The John, 2 Dods. 336.

16 The Jnffrow Maria Schroder, 3 C. Rob. 153.

17 The Hercules, 2 Dods. 368; The Edward and Mary, 3 C. Rob. 306.

§ 411. Private armed vessels.—The commission of a privateer is qualified and restrained by the power of the President to issue instructions.[1] A commission regularly issued may be forfeited by grossly illegal conduct, and one fraudulently obtained is utterly void.[2] A French privateer illegally fitted out and proscribed by the President, dismantled and sold, may subsequently be fitted out for war in a foreign port, and its captures will be legal, and not be a violation of neutrality.[3] Property belonging to a friendly power captured by an American privateer must be restored to the owner, if brought within the jurisdiction.[4] The seizure by a privateer is the act of the sovereign in so far as being entitled to exemption from scrutiny, until after the courts have decided that the capture was not sanctioned.[5] The court cannot question the validity of a commission of a foreign privateer, whose prize is brought in under the provisions of a treaty.[6] Owners of privateers are liable for acts of their commanders,[7] and for the conduct of their agents, officers, and crew, to the full value of the property injured or destroyed,[8] but not unless the property or its proceeds came into their hands.[9] Captures by privateers are not exclusively confined to the high seas, independent of any statutory enactment.[10] A mere replacement in a neutral port is not such an outfit and equipment as will invalidate the capture.[11]

1 The Thomas Gibbons, 8 Cranch, 421.

2 The Experiment, 8 Wheat. 261.

3 Williamson *v.* The Betsey, Bee, 67. And see The Divina Pastora, 4 Wheat. 69, note; Moodie *v.* The Phœbe Anne, 2 Dall. 319.

4 The Fanny, 9 Wheat. 658.

5 L'Invincible, 1 Wheat. 238; 2 Gall. 29; 6 Amer. L. J. 1; Carrington *v.* Merchants' Ins. Co. 8 Pet. 522; The Maria Francoise, 6 C. Rob. 282; The Fanny, 9 Wheat. 658. And see Talbot *v.* Jansen, 3 Dall. 133.

6 Salderondo *v.* Nostra Signora del Camino, Bee, 47; Camden *v.* Home, 4 Term Rep. 382; 1 H. Black. 476.

7 The Eleanor, 2 Wheat. 345; Del Col *v.* Arnold, 3 Dall. 333; Jennings *v.* Carson, 4 Cranch, 2.

8 Del Col *v.* Arnold, 3 Dall. 333; Hills *v.* Ross, 3 Dall. 331.

9 Jennings v. Carson, 4 Cranch, 2; Hills v. Ross, 3 Dall. 331.

10 The Joseph, 1 Gall. 557; Lindo v. Rodney, Doug. 613, note. And see The Santa Cruz, 1 C. Rob. 49; LeCaux v. Eden, Doug. 606.

11 The Divina Pastora, 4 Wheat. 67; Moodie v. The Alfred, 3 Dall. 307; Moodie v. The Phœbe Anne, 3 Dall. 319.

§ 412. Rights of neutrals.—Neutrals may purchase, during war, any property of belligerents;[1] so, when war is imminent, or after it has commenced, they may purchase either goods or ships from either belligerent, whether lying in a neutral or an enemy's port.[2] They may purchase an enemy's ship, but such purchases are liable to great suspicion, and the evidence of an absolute *bona fide* transfer ought to be clearly established;[3] and proof must be given by bill of sale and payment of a valuable consideration.[4] A neutral vessel with a neutral cargo may lawfully trade between neutral ports in all descriptions of merchandise, contraband or otherwise;[5] and persons *bona fide* resident in a neutral country have privileges to the same extent as native merchants.[6] Trade by neutrals in articles not contraband is absolutely free, unless interrupted by blockade;[7] but trade in contraband from or to an enemy port is always unlawful,[8] and if conveyed to a belligerent the goods will be liable to seizure and condemnation.[9] Great indulgence is usually granted to neutrals and to citizens as to transactions in time of peace and at the commencement of war, if they contravene no municipal or national policy.[10] There is no public or municipal law which prohibits a neutral vessel destined to a neutral port from sailing at night on the Potomac River.[11] The law of neutrality does not interdict vessels from going to sea armed and fitted for defensive war.[12] A neutral may lawfully employ an armed belligerent vessel to transport his goods.[13] Neutrals have the right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it.[14] If a neutral has a house of trade in the enemy's country as well as in the neutral country, the property in the neutral house is not involved.[15] Where a neutral has a *jus in re*, the captor takes *cum onere;* but where he has merely a *jus ad rem*, which he cannot enforce without the aid of a court of justice, his claim will not be recognized.[16] The right of a neutral to withdraw from a blockaded port does not allow her to carry any cargo other than that honestly laden before the commencement of the blockade.[17] A neutral vessel with a cargo of provisions and a license from the blockading force is entitled to a clearance.[18] A subsequent transportation to another neutral port, of a cargo shipped from a blockaded port, where no solidarity

of interests or complicity existed between the two voyages, gives a perfect title against the captors.[19]

1 U. S. *v.* Castillero, 2 Black, 362; Anonymous, 6 Opin. Att. Gen. 638; The Johanna Emilie, 29 Eng. L. & E. 562.

2 The Georgia, 7 Wall. 41; The Baltica, 11 Moore P. C. 141; 1 Spinks, 264.

3 U. S. The Lilla, 2 Cliff. 169.

4 U. S. *v.* The Lilla, 2 Cliff. 186; The Bernon, 1 C. Rob. 102; The Dree Gebroeders, 4 C. Rob. 233.

5 The Peterhoff, Blatchf. Prize, 381, 463, 506; The Stephen Hart, Ibid. 379; The Springbok, Ibid. 349, 380, 434.

6 Johnson *v.* Bales of Merchandise, 2 Paine, 630; Van Ness, 35; The Dree Gebroeders, 4 C. Rob. 233; The Adriana, 1 C. Rob. 263; The Emanuel, Ibid. 296.

7 The Peterhoff, Blatchf. Prize, 381; The Stephen Hart, Ibid. 379; The Springbok, Ibid. 349; The Helen, 1 Law Rep. Ad. & Ec. 1; Schwartz *v.* Ins Co. of N. A. 3 Wash. C. C. 117; on the contrary neutrals are entitled to freight on condemnation of cargo—Schwartz *v.* Ins. Co. of N. A. 3 Wash. C. C. 117.

8 The Peterhoff, 5 Wall. 28; Blatchf. Prize, 381, 463, 506; The Stephen Hart, Ibid. 379; The Springbok, Ibid. 349, 380, 434.

9 The Bermuda, 3 Wall. 555; The Sarah Christina, 1 C. Rob. 237; The Ringende Jacob, 1 C. Rob. 89; The Mercurius, 1 C. Rob. 80, 288; The Franklin, 3 C. Rob. 127. The only penalty is confiscation of goods on capture—The Santissima Trinidad, 7 Wheat. 283; Richardson *v.* Maine &c. Ins. Co. 6 Mass. 102; The Helen, 1 Law Rep. Ad. & Ec. 1.

10 The Ann Green, 1 Gall. 287; The Vrede Schotty's, 5 C. Rob. 12; The Vrow Elizabeth, 5 C. Rob. 11.

11 The Tropic Wind, Blatchf. Prize, 64.

12 British Consul *v.* The Mermaid, Bee, 69.

13 The Nereide, 9 Cranch, 450; The Atalanta, 3 Wheat. 415; The Catharine Elizabeth, 5 C. Rob. 206.

14 Dole *v.* New England M. M. Ins. Co. 2 Cliff. 422; The Amy Warwick, 2 Sprague, 123.

15 The Liverpool Packet, 1 Gall. 526; The Vriendschap, 4 C. Rob. 166; The Portland, 3 C. Rob. 41.

16 The Amy Warwick, 2 Sprague, 14 Law Rep. N. S. 501.

17 The Hiawatha, Blatchf. Pr. 1; 2 Black, 635; The Comet, Edw. Adm. 32.

18 Bas *v.* Steele, 3 Wash. C. C. 381.

19 The Isabella Thompson, Blatchf. Pr. 377.

§ 413. Liabilities of neutrals.—A neutral is chargeable with the acts of the party which he adopts, or of which he seeks shelter and protection,[1] and his vessel will be condemned for being in the hands of enemy merchants and employed in enemy trade.[2] He is liable for the acts of the master violating the rights of belligerents,[3] as for carrying contraband with a false destination,[4] or for use of false papers.[5] If a party attempts to cover his property with a particular character, he shall be bound to the consequences;[6] so, if a neutral endeavors to

cover enemy property, he forfeits his own as a penalty.[7] Engaging in the coasting or colonial trade of the enemy, the spoliation of papers, the fraudulent suppression of enemy's interests, affect the neutral with forfeiture of freight; but carrying dispatches or hostile military passengers, engaging in the enemy's transport service, or a breach of blockade, affects him with a confiscation of his vessel.[8] Where property of an enemy is fraudulently blended in the same claim with neutral property, the latter is liable to share the fate of the former.[9] If a neutral owner interposes a claim for a part belonging to an enemy, the part belonging to the neutral owner will be condemned.[10] If neutrals weave a web of fraud, a prize court will not take the trouble of picking out the threads, to distinguish the sound from the unsound.[11] Where a neutral claimed the property, falsely swearing that he was solely interested, but, before condemnation, consented to a decree of confiscation of the part belonging to the enemy, he may claim as to the residue.[12] In time of war a neutral vessel is subject to forfeiture if run into a blockaded port, if the owner had previous due notice of the blockade.[13] So, neglecting to keep clearly on the neutral side of the blockading line renders the vessel liable to capture.[14]

1 The Nereide, 9 Cranch, 438; The Elsebe, 5 C. Rob. 155.

2 The Bermuda, 3 Wall. 557; The Jongo Amelia, cited in 3 C. Rob. 52; The Carolina, 4 C. Rob 256; The Stephen Hart, Blatchf. Pr. 379.

3 The Peterhoff, Blatchf. Pr. 549; The Hiawatha, 2 Black, 635; Blatchf. Pr. 1; Ibid. 632; The Vrow Judith, 1 C. Rob. 150; The Columbia, Ibid. 154.

4 The Bermuda, 3 Wall. 556; The Neutralitet, 3 C. Rob. 295; Carrington v. Merchants' Ins. Co. 8 Peters, 495.

5 The Bermuda, 3 Wall. 556; Carrington v. Merchants' Ins. Co. 8 Pet. 522; The St. Nicholas, 1 Wheat. 417.

6 The Ann Green, 1 Gall. 288; The Vrow Elizabeth, 5 C. Rob. 11; The Vrow Anna Catharina, 5 C. Rob. 144.

7 The Revere, 2 Sprague, 118; The Lilla, Ibid. 182; 2 Cliff. 183; The Graaff Bernstorf, 3 C. Rob. 109; The Eenrom, 2 Rob. 1; The Dos Hermanos, 2 Wheat. 76; 10 Ibid. 306; The St. Nicholas, 1 Wheat. 417; The Fortuna, 3 Wheat. 236.

8 The Commercen, 1 Wheat. 387; The Rising Sun, 2 C. Rob. 104; The Emanuel, 1 C. Rob. 296; The Neutralitet, 3 C. Rob. 295; The Immanuel, 2 C. Rob. 186; The Sarah Christina, 1 C. Rob. 237; The Madonna del Burso, 4 C. Rob. 169; The Haase, 1 C. Rob. 236; The Welvaart van Pillaw, 2 C. Rob. 128; The Carolina, 4 C. Rob. 256; The Friendship, 6 C. Rob. 420; The Orozembo, 6 C. Rob. 430.

9 The St. Nicholas, 1 Wheat. 417; Carrington v. Merchants' Ins. Co. 8 Peters, 495.

10 The Lilla, 2 Sprague, 577; 15 Law Rep. N. S. 81; The Hallie Jackson, 18 Leg. Int. 348; Blatchf. Pr. 41; The St. Nicholas, 1 Wheat. 431;

The Betsy, 2 Gall. 385; The Graaff Bernstorf, 3 C. Rob. 111; The Eenrom, 2 C. Rob. 1.

11 The George, 1 Mason, 30; The Eenrom, 2 C. Rob. 1.

12 The Avery, 2 Gall. 386.

13 The Napoleon, Blatchf. Pr. 357.

14 The Dashing Wave, 5 Wall. 170.

§ 414. Hostile character imparted by domicile.—Every person is to be considered as belonging to that country where he has his residence.[1] A foreign resident partakes of the general character of his domicile.[2] The character of consul does not give any protection to that of merchant when united in the same person;[3] and a party is deemed a merchant of that country where he resides and carries on trade.[4] Time is the grand ingredient in constituting domicile.[5] Residence in a foreign country at war, impresses a hostile character.[6] Neutrals or citizens continuing within the authority and dominion of the enemy are clothed with the character and responsibilities of enemies, because of their residence.[7] So, citizens resident in rebellious States are regarded as enemies, without regard to their sentiments or dispositions, and whether loyal or not.[8] A residence by a trading person, for commercial purposes, in an enemy country, constitutes a domicile, imparting a natural character to the residence, although it be fluctuating and temporary, and *quasi* incorporeal and not personal.[9] Even the shortest residence, with a design of permanent settlement, stamps the party with the national character.[10] The presumption arising from actual residence is that the party is there *animo manendi*.[11] Character acquired by residence ceases only on non-residence.[12] The native character easily reverts, and it requires fewer circumstances to constitute domicile in case of a native, than to impress the national character on a foreigner.[13] As where a party puts himself *in itinere* to return to his native country he is deemed already to have resumed his native character.[14] A mere removal from a new or acquired home, with intent to return to that of origin, revives the latter *eo instanti*;[15] but intent alone is insufficient.[16] The declaration of war suspends all further commerce with the enemy, and obliges citizens to return unless they would be involved in all the consequences of the hostile character;[17] and if they wish to avoid the consequences they must actually remove before the breaking out of hostilities,[18] or measures to that effect be taken.[19] If they continue without satisfactory explanation they will be liable to be considered *remorant*, or guilty of culpable delay, and enemies.[20] A citizen has no

right to withdraw his property acquired before the war from the enemy country, after he has full knowledge of the war, without permission of his government;[21] but he is entitled to a reasonable time to withdraw from his business connections after breaking out of hostilities.[22] He can be exonerated from his hostile character either by express act of sovereign power, or by being placed in a situation where the law of nations interdicts all acts of hostility by or against him.[23]

1 The William Bagaley, 5 Wall. 406; Hogsheads of Sugar *v.* Boyle, 9 Cranch, 196; The Venus, 8 Cranch, 302; The Vigilantia, 1 C. Rob. 1; The Vrow Anna Catharina, 5 C. Rob. 144. And see as to national character of master—The Embden, 1 C. Rob. 13.

2 The San Jose Indiano, 2 Gall. 293; The Danous, cited in 4 C. Rob. 255.

3 Coppell *v.* Hall, 7 Wall. 553; The Indian Chief, 3 C. Rob. 12; The Sarah Starr, Blatchf. Pr. 76; The Ann Green, 1 Gall. 274; The Mary and Susan, 1 Wheat. 25; Arnold *v.* United Ins. Co. 1 Johns. Cas. 363; The San Jose Indiano, 2 Gall. 293; The Venus, 8 Cranch, 302; Hogsheads of Sugar *v.* Boyle, 9 Cranch, 196.

4 The Francis, 1 Gall. 616; The Indian Chief, 3 C. Rob. 12.

5 The Ann Green, 1 Gall. 285; The Amado, Newb. 409; Johnson *v.* Bales of Merchandise, 2 Paine, 629; Van Ness, 37; The Indian Chief, 3 C. Rob. 12; The Harmony, 2 C. Rob. 322; that ten years fixes national character—The Embden, 1 C. Rob. 13; twelve years—The Indian Chief, 3 C. Rob. 12; four years—The Harmony, 2 C. Rob. 322.

6 The Venus, 8 Cranch, 302; The Stephen Hart, Blatchf. Pr. 415; The Pizarro, 2 Wheat. 227; Prize Cases, 2 Black, 635; The A. J. View, Blatchf. Pr. 143; Fay *v.* Montgomery, 1 Curt. 266; Jecker *v.* Montgomery, 18 How. 111; The Amado, Newb. 408; The Chester *v.* The Experiment, 2 Dall. 41; The Embden, 1 C. Rob. 13. And see The Jonge Klarissina, 5 C. Rob. 265.

7 The Hiawatha, Blatchf. Pr. 14; The Chester *v.* The Experiment, 2 Dall. 41; The Peterhoff, Blatchf. Pr. 381; Jecker *v.* Montgomery, 18 How. 111; Prize Cases, 2 Black, 635; The Sarah Starr, Blatchf. Pr. 75; Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191; The William Bagaley, 5 Wall. 405; The Hoop, 1 C. Rob. 165; The Rapid, 8 Cranch, 155; Potts *v.* Bell, 8 Term Rep. 543; The Venus, 8 Cranch, 253; The Frances, Ibid. 418.

8 The Peterhoff, 5 Wall. 60; Mrs. Alexander's Cotton, 2 Wall. 404; Prize Cases, 2 Black, 635; The Venus, 8 Cranch, 253; Brown *v.* Hiatt, 1 Dill. 384; The Friendschaft, 4 Wheat. 105; The Indian Chief, 3 C. Rob. 12.

9 The Sarah Starr, Blatchf. Pr. 75; The Danous, cited in 4 C. Rob. 255; The Harmony, 2 C. Rob. 322; The Indian Chief, 3 C. Rob. 12; The Dree Gebroeders, 4 C. Rob. 233; The Diana, 5 C. Rob. 58; The President, Ibid. 248; The Bernon, 1 C. Rob. 102.

10 The Ann Green, 1 Gall. 285; The Indian Chief, 3 C. Rob. 12; The Diana, 5 C. Rob. 58; The Boades Lust, 5 C. Rob. 207. And see La Virginie, 5 C. Rob. 91; The Jonge Klassina, 5 C. Rob. 265; The Vriendschap, 4 C. Rob. 166; The Vrow Elizabeth, 5 C. Rob. 11.

11 The Amado, Newb. 409; The Bernon, 1 C. Rob. 102.

12 The Indian Chief, 3 C. Rob. 12.

13 The Francis, 1 Gall. 616; La Virginie, 5 C. Rob. 91; Johnson *v.* Bales of Mdse. 2 Paine, 632; Van Ness, 37.

14 The Francis, 1 Gall. 616; The Indian Chief, 3 C. Rob. 12.

15 In re Walker, 1 Low. 238; The Indian Chief, 3 C. Rob. 12; The Venus, 8 Cranch, 309; The Ann Green, 1 Gall. 274; The Diana, 5 C. Rob. 58. But a temporary return does not revive citizenship—Burnham v. Rangeley, 1 Wood. & M. 11; The Friendschaft, 4 Wheat. 105.

16 The Venus, 8 Cranch, 309; The President, 5 C. Rob. 248; Johnson v. Cases of Merchandise, Van Ness, 40.

17 The Joseph, 1 Gall. 551.

18 The Ocean, 5 C. Rob. 84, 297; The Vigilantia, 1 C. Rob. 1; The Francis, 1 Gall. 617.

19 The Rapid, 1 Gall. 307; The Indian Chief, 3 C. Rob. 12.

20 The William Bagaley, 5 Wall. 408; The Ocean, 5 C. Rob. 84, 297; The Venus, 8 Cranch, 302.

21 The Dashing Wave, 5 Wall. 170; The Gray Jacket, Ibid. 342; The William Bagaley, Ibid. 377; The Rapid, 1 Gall. 311, explaining The Harmony, 2 C. Rob. 322. And see The Juffrow Catharina, 5 C. Rob. 126; The Dree Gebroeders, 4 C. Rob. 233; The Ocean, 5 C. Rob. 297; The Madonna delle Gracie, 4 C. Rob. 195; Bell v. Gilson, 1 Bos. & P. 345; The Amy Warwick, 2 Sprague, 131; The Hoop, 1 C. Rob. 165.

22 The Sarah Starr, Blatchf. Pr. 652; The San Jose Indiano, 2 Gall. 267; 1 Wheat. 108; The John Gilpin, Blatchf. Pr. 661.

23 Johnson v. Bales of Merchandise, 2 Paine, 650; Van Ness, 57; The Zodiack, Stuart V. A. 333; The Hope, 1 Dods. 226.

§ 415. Hostile property.—The origin of the property, or the traffic, may stamp it with a hostile taint, although the owner may happen to be a neutral domiciled in a neutral country.[1] The share of a neutral partner must follow the fate of the shares of his partners.[2] The property of persons settled in an enemy's country is affected with a hostile character, though they be neutrals,[3] and though they be not traitors.[4] That it is impressed with a hostile character does not necessarily import that the owner is personally hostile; the condemnation is the exercise of a belligerent policy, and not an infliction of personal punishment.[5] The property of a commercial house established in the enemy's country is subject to seizure and condemnation as prize,[6] though some of the parties may have a neutral domicile,[7] but their separate property will not be affected.[8] The exemption of enemy property from the effect of hostilities is the exercise of a very high act of sovereignty, and no consul can exercise such authority.[9] The hostile character of the property at the time of the capture establishes the legality of the capture.[10] A shipment made by a house in the enemy country must be deemed enemy's property.[11] So a shipment to an agent does not divest the title of the shipper,[12] nor a shipment to his creditor,[13] nor a shipment to be conditionally delivered,[14] nor a shipment made without orders or contrary to orders.[15] A prize court regards property as that of the shipper or consignor,[16] and its hostile character is presumed from sending invoices and letters of instruction by mail.[17] Prop-

erty shipped to a party afterward an enemy, if made at the risk of the shipper in peace, will be protected.[18] If the beneficial interest in property is in the enemy, it is subject to condemnation.[19] The true criterion of proprietorship is—on whom will the loss fall?[20] The title of the absolute owner prevails, whatever be the equities between the parties.[21] A transfer of property to a neutral by an enemy in time of war, or in aid of a contemplated war, is illegal and in violation and fraud of belligerent rights.[22] The title cannot be varied in transit,[23] except when the transfer is made in time of peace, without reference to a contemplation of hostilities.[24] The thing sold after completion of the contract is properly at the risk of the purchaser.[25]

1 The Mary Clinton, Blatchf. Pr. 560; The San Jose Indiano, 2 Gall. 286; The Vigilantia, 1 C. Rob. 1; The Susa, 2 C. Rob. 251; The Princessa, Ibid. 51; The Jonge Emilia, cited in 3 C. Rob. 52; The Dree Gebroeders, 4 C. Rob. 233; The Anna Catharina, Ibid. 107; The Rendsberg, Ibid. 121; The Maria, 5 C. Rob. 325; The Phœnix, Ibid. 25; The Vrow Anna Catharina, 5 C. Rob. 144; The Vriendschap, 4 C. Rob. 166; Berens v. Pucker, 1 W. Black. 313; The Immanuel, 2 C. Rob. 186.

2 The William Bagaley, 5 Wall. 410; The Crenshaw, Blatchf. Pr. 26; The Francis, 1 Gall. 618; The San Jose Indiano, 2 Ibid. 268; The Antonia Johanna, 1 Wheat. 159; The Industrie, 32 Eng. L. & E. 572; The Princess, 29 Eng. L. & E. 589; The Friendschaft, 4 Wheat. 105; The Cheshire, 3 Wall. 231; The Franklin, 3 C. Rob. 127; The Venus, 8 Cranch, 299; The Vigilantia, 1 C. Rob. 1.

3 The Amado, Newb. 406; The Ann Green, 1 Gall. 274.

4 The Amy Warwick, 2 Sprague, 142; The Hallie Jackson, Blatchf. Pr. 41; The Tropic Wind, Ibid. 64; The North Carolina, Ibid. 44; The Pioneer, Ibid. 422, 666.

5 The Amy Warwick, 2 Sprague, 143; 14 Law Rep. N. S. 494.

6 The Antonia Johanna, 1 Wheat. 159; The Francis, 8 Cranch, 363; The Friendschaft, 4 Wheat. 105; The Cheshire, 3 Wall. 231; The Mary & Susan, 1 Wheat. 46; The Society &c. v. Wheeler, 2 Gall. 131; The Vigilantia, 1 C. Rob. 1; The San Jose Indiano, 2 Gall. 286; The Indian Chief, 3 C. Rob. 12; The Lilla, 2 Sprague, 178; The Amy Warwick, 2 Sprague, 123, 143.

7 The Cheshire, 3 Wall. 233; The Friendschaft, 4 Wheat. 105; 3 Ibid. 14; The San Jose Indiano, 2 Gall. 286.

8 The San Jose Indiano, 2 Gall. 286; The Henrick & Maria, 4 C. Rob. 43; The Aurora, Ibid. 218.

9 The Amado, Newb. 402; The Hope, 1 Dods. 226.

10 The Venus, 8 Cranch, 253.

11 The Francis, 1 Gall. 618; The San Jose Indiano, 2 Ibid. 268; The Amado, Newb. 406; The Amy Warwick, 2 Sprague 131; The Venus, 8 Cranch, 253; The Hoop, 1 C. Rob. 165.

12 The San Jose Indiano, 2 Gall. 297; The Merrimac, 8 Cranch, 317; 1 Woods, 65.

13 The Hannah M. Johnson, Blatchf. Pr. 97.

14 The Merrimack, 8 Cranch, 334; The Marianna, 6 C. Rob. 22; The Aurora, 4 C. Rob. 218.

terms of sale,[7] the service of the vessel, and the names and residence of the masters both before and after the transfer.[8] The register seen by the master is not sufficient evidence of ownership,[9] but a *bona fide* gift is valid as a sale.[10] In case of a sale the receipt of the purchase-money should be produced; but if the transfer is *bona fide* and complete, it will be good if no receipt is produced.[11] If the purchase was made through an agent, the letters of attorney should be produced.[12] A transfer by an enemy to a neutral in an enemy port, during the war, will not divest the vessel of its hostile character[13] if made for the purpose of continuing in trade with the enemy.[14] So, a transfer made in a blockaded port in time of war is invalid;[15] or while lying in a neutral port to which it had fled for refuge.[16] Having permission of the owner for the use of a vessel in a hostile character renders her liable.[17] So, habitual employment in the coasting trade of the enemy stamps the vessel with a hostile character.[18] So, where the agent of the owner suffers her to be employed by the enemy.[19] Enemy vessels include vessels in the service of the enemy as transports, even if serving under duress;[20] or if fitted as vessels of war, and going to the enemy for sale;[21] or sailing under the flag and pass of the enemy.[22] The use of an enemy's flag is a mark and token of her real ownership.[23] The owner is bound by the insignia of national character, and cannot deny the character the ship has assumed for his benefit.[24] Although a ship carries a neutral flag, if her owners reside in the enemy country she may be condemned as prize.[25] The neutral flag constitutes no protection to enemy's property, and the belligerent flag communicates no hostile character to neutral property.[26] A vessel is deemed hostile while sailing under convoy supplied by the enemy.[27] The ship's papers are conclusive of the national character of the ship as against the claimants.[28]

1 The Primus, Spinks, 48; The Industrie, Ibid. 56.

2 The Flad Oyen, 1 C. Rob. 116; The Danckebaar Africaan, 1 C. Rob. 111; The Vrow Margaretha, 1 C. Rob. 336; The Baltica, 11 Moore P. C. 141.

3 The Stephen Hart, Blatchf. Pr. 413; The Christine, Spinks, 82; The Bernon, 1 C. Rob. 102; The Welvaart, 1 C. Rob. 122; The Odin, 1 C. Rob. 250; The Sechs Geschwistern, 4 C. Rob. 101; The Baltica, 11 Moore P. C. 141; The Otto and Olaff, Spinks, 161; The Benedict, Ibid. 320; The Caroline, Ibid. 256; The Maria, Ibid. 321; The Mersey, Blatchf. Pr. 190; The Albert, Ibid. 280.

4 The Sarah Starr, Blatchf. Pr. 76; The Baltic, 11 Moore P. C. 141; Spinks, 264.

5 The Sarah Starr, Blatchf. Pr. 76; The Ernst Merk, Spinks, 98; The Adventure, 8 Cranch, 226; The Flad Oyen, 1 C. Rob. 135; if a note be

taken the sale is illegal—The William H. Northrop, Blatchf. Pr. 237; The Bernon, 1 C. Rob. 102.

6 The Stephen Hart, Blatchf. Pr. 414; The Sisters, 5 C. Rob. 138; The Mersey, Blatchf. Pr. 190; The Christine, Spinks, 82.

7 The Sechs Geschwistern, 4 C. Rob. 100.

8 The Juffrow Anna, 1 C. Rob. 126; The Christine, Spinks, 83; The Benedict, Ibid. 316; The Juffrow Elbrecht, 1 C. Rob. 127; The Endraugdt, 1 C. Rob. 22; The Maria, 11 Moore P. C. 271; The Hoop, 1 C. Rob. 129; The Vigilantia, 1 C. Rob. 13; The Omnibus, 6 C. Rob. 71.

9 The Mersey, Blatchf. Pr. 190; The Two Brothers, 1 C. Rob. 131.

10 The Benedict, Spinks, 316.

11 The Rapid, Spinks, 80; The Christine, Ibid. 83; The Ernst Merk, Ibid. 100; The Soglasie, Ibid. 110; The Johanna Emilie, Ibid. 12; The Bernon, 1 C. Rob. 102; The Sechs Geschwistern, 4 C. Rob. 100; The Ariel, 11 Moore P. C. 119; The Benedict, Spinks, 316; The Otto and Olaff, Ibid. 261.

12 The Argo, 1 C. Rob. 158.

13 The Cheshire, Blatchf. Pr. 151; Ibid. 643.

14 The Delta, Blatchf. Pr. 133.

15 The Stephen Hart, Blatchf. Pr. 415; The General Hamilton, 6 C. Rob. 61; The Two Brothers, 1 C. Rob. 131.

16 The Georgia, 7 Wall. 40; 1 Low. 98; The Minerva, 6 C. Rob. 396.

17 Jecker *v.* Montgomery, 18 How. 116; The Palmyra, 12 Wheat. 1; U. S. *v.* The Malek Adhel, 2 How. 210; U. S. *v.* The Little Charles, 1 Brock. 347; The Vrow Judith, 1 C. Rob. 150.

18 The Welvaart, 1 C. Rob. 122.

19 The Napoleon, Blatchf. Pr. 298; The Orozembo, 6 C. Rob. 430; The Carolina, 4 C. Rob. 256.

20 The Rebecca, 2 Act. 119; The Friendship, 6 C. Rob. 420; as a vessel in the naval service of the enemy as a gunboat—The Ellis, Blatchf. Pr. 248.

21 The Richmond, 5 C. Rob. 226; The Brutus, cited in Ibid. 296; The Rebecca, 2 Act. 119; The Fanny, 5 C. Rob. 370; The Neptune, Ibid. 370; The Raven, Ibid. 371.

22 U. S. *v.* The Telegrafo, Newb. 383; The William Bagaley, 5 Wall. 410; The Success, 1 Dods. 132; The Vrow Elizabeth, 5 C. Rob. 11; The Fortuna, 1 Dods. 81; Hooper *v.* The Hiram, Fish Pr. 75; 8 Cranch, 449; The Julia, 8 Cranch, 181; 1 Gall. 594.

23 The Hallie Jackson, Blatchf. Pr. 42; The William Bagaley, 5 Wall. 410; The Success, 1 Dods. 132; The Fortuna, Ibid. 81; The Vrow Elizabeth, 5 C. Rob. 11.

24 The William Bagaley, 5 Wall. 410; The Fortuna, 1 Dods. 81; The Success, Ibid. 132; The Vrow Elizabeth, 5 C. Rob. 11.

25 The San Jose Indiano, 2 Gall. 268.

26 The El Telegrafo, Newb. 386; The Nereide, 9 Cranch, 388.

27 The Maria, 1 C. Rob. 346; The Nereide, 9 Cranch, 441; but otherwise while sailing under a neutral convoy—The Nereide, 9 Cranch, 441.

28 U. S. *v.* Bartlett, 2 Ware, 16; The Santissima Trinidad, 7 Wheat. 283; The Vrow Elizabeth, 5 C. Rob. 11.

§ 417. Sailing under enemy's license.—Every vessel trading under an enemy's license is deemed an enemy's ship, and liable to forfeiture.[1] So a neutral vessel sailing under an enemy's license is lawful prize.[2] The taking of the license impresses it with a hostile character,[3] and as long as she retains it she is liable to confiscation *jure belli*.[4] The acceptance and use of an enemy's license, whether efficacious or not, is ordinarily regarded as illegal, and as subjecting the vessel and cargo using it to confiscation as prize of war.[5] The existence and employment of enemy's license is strong presumption of concealed criminal intent, or at least of ultimate destination for enemy's use.[6] A personal license is distinguished from a general order of the enemy authorizing and protecting all trade to a neutral country.[7]

1 The Caledonian, 4 Wheat. 100; and see Wilson *v.* Le Roy, 1 Brock. 447; Anonymous, 1 Car. Law. Rep. 190; Anonymous, Id. 204; Patton *v.* Nicholson, 3 Wheat. 204; Craig *v.* U. S. Ins. Co., Pet. C. C. 410; The Hiram, 8 Cranch, 449; The Julia, Id. 181; 1 Gall. 594.

2 The Ariadne, 2 Wheat. 143; The Alliance, Blatchf. Pr. 262; Ibid. 646; The Gondar, Ibid. 266; The Saunders, 2 Gall. 210. And see Rev. Stats. sec. 4761.

3 Maisonnaire *v.* Keating, 2 Gall. 333; The Julia, 8 Cranch, 181; 1 Gall. 594.

4 The Amado, Newb. 405; The Saunders, 2 Gall. 210; The Vrow Elizabeth, 5 C. Rob. 11.

5 The Sarah Starr, Blatchf. Pr. 85; The Aurora, 8 Cranch, 203; U. S. *v.* The Fanny, 9 Cranch, 181; The Ariadne, 2 Wheat. 143; Patton *v.* Nicholson, 3 Wheat. 207; The Hiram, 8 Cranch, 444; 1 Wheat. 440; The Julia, 8 Cranch, 181; 1 Gall. 594; U. S. *v.* The Tulip, Fish. Pr. 5; Donnath *v.* Ins. Co. of N. A. 4 Dall. 463; Coppell *v.* Hall, 7 Wall. 558; The Commercen, 1 Wheat. 382; The Alliance, Blatchf. Pr. 264; The Gondar, Ibid. 268; The Vrow Elizabeth, 5 C. Rob. 11; The Vrede Schottys, 5 C. Rob. 12, note; The Vriendschap, 4 C. Rob. 96; The Rendsberg, 6 C. Rob. 142; The Clarissa, cited in 5 C. Rob. 4.

6 The Amado, Newb. 404; The Julia, 8 Cranch, 181; 1 Gall. 594.

7 The Julia, 8 Cranch, 181; 1 Gall. 594.

§ 418. What is lawful prize.—Prize goods are goods taken on the high seas, *jure belli*, out of the hands of the enemy,[1] and includes all property of an alien enemy,[2] and all choses in action belonging to an enemy,[3] and the interest or expectancy of creditors in enemy property arrested as prize does not exempt it from capture.[4] Property seized by an armed vessel of the Government while afloat in an enemy's port, on board of an enemy's vessel, is lawful prize, under the law of nations,[5] and may be captured although stored in a warehouse.[6] No legislation is necessary to authorize the seizure of enemy property found within belligerent territory at the commencement of hostilities.[7] Property captured at sea and owned by

persons resident in an enemy's country is lawful prize.[8] So property belonging to a merchant residing at an enemy's port is liable to condemnation.[9] The liability of property, the product of an enemy country, and coming from it during the war, is irrespective of the *status domicilii*, guilt or innocence of the owner.[10] Such as is not enumerated by the act of Congress may be regarded as prize under the general maritime law.[11] Vessels which pick up enemy goods thrown overboard during a chase are entitled to them as captors, and not as salvors,[12] as cotton abandoned either by an enemy or a neutral.[13] Cotton, rosin, staves, and planks, being enemy's property employed at the time in aiding hostilities, are prize of war;[14] so nautical instruments of a master actively engaged in acts of hostility.[15] A large sum of money found on the prize, though claimed as private property of the master, was condemned as prize.[16] A vessel and cargo belonging to residents of an insurrectionary State are subject to condemnation as prizes of war.[17] When the vessel is liable, the presumption is that the cargo is also.[18] A vessel is subject to capture even after the port in which she lies has been captured, and is in the custody of the army of the United States.[19]

1 Bales of Cotton, 1 Low. 14; The Conqueror, 2 C. Rob. 303; Johnson *v.* Twenty-one Bales, 2 Paine, 601; Van Ness, 5; 6 Amer. Law J. 68; 3 Wheel. Cr. Cas. 433.

2 Fairfax *v.* Hunter, 7 Cranch, 620; Brandon *v.* Nesbitt, 6 Term Rep. 23; The Rapid, 8 Cranch, 155; The Hoop, 1 C. Rob. 165; The Nelly, Ibid. 219; Prize Cases, 2 Black, 687; Brown *v.* U. S. 8 Cranch, 109.

3 The Emulous, 1 Gall. 580; Brown *v.* U. S. 8 Cranch, 143; Furtado *v.* Rogers, 3 Bos. & P. 191; Attorney-General *v.* Weedon, Parker, 267. But see U. S. *v.* Virginia Bonds, 9 Pitts. L. J. 377.

4 U. S. *v.* The Sally Magee, 4 Int. Rev. Rec. 134; The Mary Clinton, Blatchf. Pr. 561.

5 Bags of Rice, Blatchf. Pr. 211; Genoa and its Dependencies, 2 Dods. 444; The Two Friends, 1 C. Rob. 228; The Douna Barbara, 2 Hagg. Adm. 366; The Charlotte, 1 Dods. 212; The Melomane, 5 C. Rob. 43; Brown *v.* U. S. 8 Cranch, 143.

6 Bags of Rice, Blatchf. Pr. 211; Genoa and its Dependencies, 2 Dods. 444; The Melomane, 5 C. Rob. 43.

7 Bags of Rice, Blatchf. Pr. 212, explaining Brown *v.* U. S. 8 Cranch. 109; 1 Gall. 563.

8 The Amy Warwick, 2 Sprague, 123; The Lilla, 15 Law Rep. 81; 2 Sprague, 277; The Venus, 8 Cranch, 285; The Diana, 5 C. Rob. 58; The Boedes Lust, Ibid. 207; The Harmony, 2 C. Rob. 322; The Indian Chief, 3 C. Rob. 12; The Ocean, 5 C. Rob. 84, 297; Calbreath *v.* Gracy, 1 Wash. C. C. 224; The Santa Cruz, 1 C. Rob. 49. The court has a right to resort to the domicile alone—The San Jose Indiano, 2 Gall. 288, explaining The Johannes *v.* Osprey, 1 C. Rob. 14; and see The Nancy, 1 C. Rob. 14.

9 The Delta, Blatchf. Pr. 133. But where he converted his effects into a vessel and cargo, intending to give himself up to the blockading

squadron, they were not liable to capture—The General C. C. Pinckney, Blatchf. Pr. 663; The Evening Star, Ibid. 584.

10 The Dashing Wave, 5 Wall. 170; The Gray Jacket, Ibid. 342; The William Bagaley, Ibid. 377; The Mary Clinton, Blatchf. Pr. 556; The Vigilantia, 1 C. Rob. 1; Bales of Cotton, Blatchf. Pr. 644.

11 The Siren, 1 Low. 280.

12 The Victory, 2 Sprague, 226.

13 Bales of Cotton, 1 Low. 11; The Wando, Ibid. 18; The Siren, 1 Low. 282; U. S. v. Padelford, 9 Wall. 540; Mrs. Alexander's Cotton, 2 Wall. 404; Haycraft v. U. S. 22 Wall. 93; White v. The Red Chief, 1 Woods, 41.

14 Two Hundred and Eighty-two Bales of Cotton, Blatchf. Pr. 302.

15 The Ouachita, Blatchf. Pr. 306.

16 The Wando, 2 Int. Rev. Rec. 117.

17 The Sally Magee, Blatchf. Pr. 382; 3 Wall. 451; The Crenshaw, Blatchf. Pr. 2; The Mary McRae, Blatchf. Pr. 91.

18 The Sally Magee, 3 Wall. 457; Anonymous, 2 Wheat. App. 11.

19 The Gondar, Blatchf. 266; The Alliance, Ibid. 186.

§ 419. What not lawful prize.—Enemy's property within the territory of the United States on the breaking out of war cannot be confiscated without an act of Congress authorizing such confiscation.[1] Goods owned in the enemy's country and found here in custody of a citizen are not subject to condemnation as prize.[2] So a vessel belonging to an alien resident transiently, and on a visit, and engaged in no mercantile business, is not subject to forfeiture.[3] A Spanish-owned vessel in distress, by leave of the admiral commanding, put into a blockaded port, and was there seized as prize of war, and used by the government: was held not a lawful prize.[4] All captures made by armed vessels in a bay, river, mouth of a river, or harbor of a neutral state, are illegal and void.[5] A rebel cruiser while anchored in a neutral port cannot be seized as a prize of war.[6] A capture within the territorial seas of a neutral country, or by a privateer illegally equipped in a neutral country, or by persons who could not without violation of allegiance to a neutral country act under a belligerent commission, is invalid.[7] Where property is captured within the limits of a neutral country, the original owner cannot claim it in the courts of the country at war with his.[8] And if a hostile vessel commences hostilities in neutral waters, she has no redress if captured.[9] A neutral cargo found on board an armed enemy's vessel is not liable to condemnation as prize of war[10]—nor books intended for a public library,[11] nor slaves captured in time of war.[12]

1 Wagner v. The Juniata, Newb. 352.

2 Brown *v.* The U. S. 8 Cranch, 110, reversing The Emulous, 1 Gall. 563. And see The Adventure, 8 Cranch, 221; The Aquila, 1 C. Rob. 32.

3 The D. F. Keeling, Blatchf. Prize, 92.

4 The Nuestra Senora de Regla, 17 Wall. 29.

5 Collins *v.* The Florida, 2 McArth. 443; The Vrow Anna Katharina, 5 C. Rob. 144; The Anne, 3 C. Rob. 54; The Twee Gebroeders, Ibid. 162.

6 Collins *v.* The Florida, 2 McArth. 438.

7 The Invincible, 2 Gall. 37; Talbot *v.* Janson, 3 Dall. 133.

8 Johnson *v.* Bales of Goods, 2 Paine, 649; Van Ness, 56; The Twee Gebroeders, 2 C. Rob. 336; 3 Ibid. 162.

9 The Anne, 3 Wheat. 435.

10 The Atalanta, 3 Wheat. 409; The Nereide, 9 Cranch, 388.

11 The Amelia, 4 Phila. 417.

12 Almeida *v.* Certain Slaves, 5 Amer. Law J. 459.

§ 420. Causes for capture and condemnation.—Aiding and promoting the commerce of the enemy is a ground for condemnation.[1] So, employment in enemy's trade,[2] as taking on board a cargo from an enemy's ship on pretense that it was ransomed.[3] So, persistent misrepresentation of a neutral claimant of the character and destination of the voyage is a cause for condemnation;[4] but not where the misrepresentation arose from an error of judgment.[5] An attempt of a neutral to mislead by deceptive misrepresentations on the ship's papers, amounts to fraudulent misconduct which justifies a confiscation.[6] So, false papers, under certain circumstances, affect the property with condemnation.[7] The suppression or spoliation of papers is not now considered as *per se* damnatory cause of forfeiture of vessel and cargo;[8] but an obstinate suppression, coupled with a voyage from an enemy's country, is cause for condemnation.[9] The suppression or spoliation of papers is a strong presumption of fraudulent purpose,[10] and in all cases is considered proof of *mala fides*.[11] It not only excludes further proof, but *per se* infers condemnation;[12] but is subject to explanation;[13] and the explanation must be prompt and frank.[14] The absence of invoices is a circumstance of suspicion.[15] So, where some papers were burned and others thrown overboard.[16] The want of a log-book is sufficient cause for condemnation, unless satisfactorily explained.[17] An attempt on the part of a neutral to mislead a blockading force, by deceptive ship's papers, amounts to fraudulent misconduct, and justifies confiscation.[18] The true destination should be stated in the ship's papers, and a contingent destination must also appear.[19] Instructions to call at the blockaded port for inquiry and thence proceed to a neutral port, if

the blockade was still in existence, was held fraudulent.[20] A fraudulent concealment is a ground for condemnation.[21] Where a neutral owner lends his name to cover a fraud, the vessel will be condemned;[22] and a fraudulent concealment on the return voyage is deemed committed on the outward voyage;[23] but the owners, if innocent, and in no way connected with the cargo, are not implicated by the false statements of the master, beyond the extent of depriving them of costs on restoration of the vessel.[24] So, the assertion of a false claim by an agent, or by one in connivance with the real owner, is cause for condemnation.[25] The cargo is subject to forfeiture, either as being enemy property, or that it was intended to be carried into a blockaded port.[26] The claimant must make out a good and sufficient title before he can call upon the captors to show any ground for the capture.[27]

1 The Hannah M. Johnson, Blatchf. Prize, 162; The Sally, 8 Cranch, 382; The Hoop, 1 C. Rob. 165; The Rapid, 8 Cranch, 155; The Antonia Johanna, Wheat. 150.

2 The Bermuda, 3 Wall. 557; The Jonge Amelia, cited in 3 C. Rob. 52. Employment in laying down a submarine telegraph for a belligerent is employment in his service—The International, 3 Law Rep. Ad. & Ec. 321.

3 The Lord Wellington, 2 Gall. 103.

4 The Revere, 2 Sprague, 119; 14 Am. L. R. N. S. 276; The Franklin, 3 C. Rob. 127; The Phœnix, Ibid. 103; The America, Ibid. 36; The Carolina, Ibid. 75; The Franklin, Ibid. 217; The Phœnix, Ibid. 186; The Ebenezer, 6 C. Rob. 256.

5 The Nereide, 9 Cranch, 388.

6 The Louisa Agnes, Blatchf. Prize, 107; The Ella Warley, Ibid. 288.

7 The Liverpool Packet, 1 Gall. 519; The Richmond, 5 C. Rob. 290; The Jonge Margaretha, 1 C. Rob. 189; The Oster Risoer, 4 C. Rob. 199.

8 The Mersey, Blatchf. Prize, 193, 658; The Pizarro, 2 Wheat. 227.

9 The St. Lawrence, 1 Gall. 467. And see The Andromeda, 2 Wall. 481.

10 The Mersey, Blatchf. Prize, 193; The Two Brothers, 1 C. Rob. 131; The Pizarro, 2 Wheat. 248; The Nereide, 9 Cranch, 388.

11 The Stephen Hart, Blatchf. Prize, 425. And ground for condemnation—The Peterhoff, Blatchf. Prize, 537; The Rising Sun, 2 C. Rob. 214; The Pizarro, 2 Wheat. 227; Bernardi *v.* Motteaux, 2 Doug. 574; The Two Brothers, 1 C. Rob. 131; The Mersey, Blatchf. Pr. 193.

12 The Peterhoff, Blatchf. Prize, 537; The Hunter, 1 Dods. 480; The Zavala, Blatchf. Prize, 174.

13 The Stephen Hart, Blatchf. Prize, 425; The Hunter, 1 Dods. 480; The Pizarro, 2 Wheat. 227; The Peterhoff, Blatchf. Prize, 537; The Mersey, Ibid. 193; The Rising Sun, 2 C. Rob. 104; The Two Brothers, 1 C. Rob. 131. Yet, if the explanation be not prompt and frank, or be weak and futile, it is a ground for the denial of further proof and for condemnation—The Peterhoff, Blatchf. Prize. 537; The Pizarro, 2 Wheat. 227; Bernardi *v.* Motteaux, 2 Doug. 574.

14 The Stephen Hart, Blatchf. Prize, 379; The Pizarro, 2 Wheat. 227; Bernardi *v.* Motteaux, 2 Doug. 574; The Two Brothers, 1 C. Rob. 131; The Peterhoff, Blatchf. Prize, 537.

temporary occupation of the enemy is not such hostile port.[9] The necessity for a voyage to enable the vessel to discharge her expenses is no excuse in case of an illegal voyage,[10] nor that the vessel was chartered to return property deposited in the enemy's territory before the war, if the charter party was entered into with knowledge of the war.[11] The circumstance of funds in an enemy's country, or purchase of goods before the war, will not shelter a party from the operation of the rule as to illegal traffic.[12]

1 Hopner *v.* Appleby, 5 Mason, 77; Findlay *v.* The William, 1 Pet. Adm. 12; Consul of Spain *v.* Consul of Great Britain, Bee, 263.

2 Maisonnaire *v.* Keating, 2 Gall. 336; The Julia, 8 Cranch, 181; 1 Gall. 594, explaining The Clarissa, cited in 5 C. Rob. 4.

3 Jecker *v.* Montgomery, 18 How. 113; The Hoop, 1 C. Rob. 165; The Nayade, 4 C. Rob. 251; The Ceres, 3 C. Rob. 79; The Neptunus, 6 C. Rob. 403; The Hiram, 8 Cranch, 444.

4 The Shark, Blatchf. Prize, 218; The Vigilantia, 1 C. Rob. 1; The Princessa, 2 C. Rob. 51; The Hoop, 1 C. Rob. 165.

5 The San Jose Indiano, 2 Gall. 288; The Susa, 2 C. Rob. 251; The Indiana, cited in 3 C. Rob. 44. And see The Herman, 4 C. Rob. 228.

6 The San Jose Indiano, 2 Gall. 290; The Indiana, cited in 3 C. Rob. 44; The Anna Catharina, 4 C. Rob. 107. But see The Flad Oyen, 1 C. Rob. 135; The Nayade, 4 C. Rob. 251.

7 The Mary, 9 Cranch, 126.

8 The Joseph, 8 Cranch, 454.

9 The Gerasimo, 11 Moore P. C. 100.

10 Jecker *v.* Montgomery, 18 How. 114; Otis *v.* Walter, 2 Wheat. 18; The New York, 3 Wheat. 59; Hallet *v.* Jenks, 3 Cranch, 210; U. S. *v.* The Fanny, 9 Cranch, 181; The Rapid, 8 Cranch, 155; The Alexander, 4 C. Rob. 93; The Mary, 9 Cranch, 126; The Joseph, 1 Gall. 545; 8 Cranch, 431; Potts *v.* Bell, 8 Term Rep. 543; The Madonna delle Gracie, 4 C Rob. 195; The Grotius, 8 Cranch, 460; The Hoop, 1 C. Rob. 165.

11 The Rapid, 1 Gall. 295; The Alexander, Ibid. 532.

12 The St. Lawrence, 1 Gall. 470; The Hoop, 1 C. Rob. 196, citing The Lady Jane, The William, and The St. Phillip; The Juffrow Louisa Margaretha, cited 1 C. Rob. 203; Potts *v.* Bell, 8 Term Rep. 543; The Indian Chief, 3 C. Rob. 12.

§ 422. Condemnation for trading with enemy. Without the license of the Government, no communication, direct or indirect, can be carried on with the enemy.[1] Public war imports a prohibition of commercial intercourse,[2] and trading with the enemy is an offense under the laws of war,[3] and against the maritime law.[4] By act of Congress and by proclamation, commercial intercourse with inhabitants of the revolted States, except under license of the President, was entirely prohibited,[5] and private citizens were prohibited from trading at all in the insurrectionary districts,[6] and a military license to trade was void.[7] All commercial intercourse or trade with the enemy is illegal,[8] and stamps the property with a hostile

Wall. 617; The Sea Lion, 5 Wall. 630; The John Gilpin, Blatchf. Pr. 291; Bales of Cotton, 1 Low. 11. A license to procure a cargo from an insurrectionary district does not confer a license to take a cargo to such district—The Reform, 3 Wall. 617. So a license obtained through fraud, error, or mistake will not prevent a forfeiture—U. S. *v.* Barrels of Cement, 3 Amer. L. Reg. N. S. 735.

6 Maddox *v.* U. S. 15 Wall. 60; U. S. *v.* Lane, 8 Wall. 185. Instances of unlawful commerce with residents of insurrectionary States—The Reform, 3 Wall. 617; U. S. *v.* Weed, 5 Ibid. 62; The Gray Jacket, Ibid. 342; The Hampton, Ibid. 372; The Sea Lion, Ibid. 630; The Cotton Cases, 2 Ct. Cl. 529; 6 Int. Rev. Rec. 21; Blakeley *v.* U. S. 2 Ct. Cl. 323; The David E. Wolf, 7 Int. Rev. Rec. 194.

7 McKee *v.* U. S. 8 Wall. 167; The Ouachita Cotton, 6 Wall. 521.

8 Philips *v.* Hatch, 1 Dill. 577; Griswold *v.* Waddington, 16 Johns. 438; Billgery *v.* Branch, 8 Amer. Law Reg. N. S. 334; Flindt *v.* Waters, 15 East, 260; Wilson *v.* Patterson, 7 Taunt. 439; Ex parte Boussmaker, 13 Ves. Jr. 71; The Hoop, 1 C. Rob. 165; Potts *v.* Bell, 8 Term Rep. 543; The Rapid, 8 Cranch, 155; 1 Gall. 295; Prize Cases, 2 Black, 635; The Diana, 2 Gall. 98; The Alexander, 8 Cranch, 169; 1 Gall. 532; The Sally, 8 Cranch, 382.

9 The Sally, 8 Cranch, 382; The Hoop, 1 C. Rob. 219.

10 Prize Cases, 2 Black, 674; The Sally, 8 Cranch, 382.

11 The Sarah Starr, Blatchf. Pr. 76; The Abo, Spinks, 42; The Johanna Emilie, 29 Eng. L. & E. 562; The Christine, Spinks, 82; The Hoop, 1 C. Rob. 165.

12 The Joseph, 1 Gall. 561; Potts *v.* Bell, 8 Term Rep. 543; The William, 5 C. Rob. 349; The Ringende Jacob, 1 C. Rob. 89; The Compte de Wohrenzoff, cited in 1 C. Rob. 205; The Expedite Van Rotterdam, cited in 1 C. Rob. 206; The William, 5 C. Rob. 349; The Hoop, 1 C. Rob. 165; The Alexander, 8 Cranch, 169; 1 Gall. 532.

13 The St. Lawrence, 1 Gall. 471; The Hoop, 1 C. Rob. 165, and cases cited; The Indian Chief, 3 C. Rob. 12.

14 Jecker *v.* Montgomery, 18 How. 114; The Joseph, 1 Gall. 554; The Hoop, 1 C. Rob. 165; The Nelly, cited 1 C. Rob. 219; Hanger *v.* Abbott, 6 Wall. 535; The Rapid, 1 Gall. 310; Juffrow Louisa Margaretha, cited in 1 C. Rob. 203; The St. Philip, cited in 1 C. Rob. 177; The Eenigheid, cited in 1 C. Rob. 177, and 8 Term Rep. 555; The Freeden, cited in 1 C. Rob. 179, and 8 Term Rep. 560; The Indian Chief, 3 C. Rob. 12.

15 The Ann Green, 1 Gall. 290; The Anna Catharina, 4 C. Rob. 107; The Princessa, 2 C. Rob. 51; The Rendsberg, 4 C. Rob. 121.

16 The Saunders, 2 Gall. 215; The Abby, 5 C. Rob. 251.

17 The Saunders, 2 Gall. 210; The Thomas Gibbons, 8 Cranch, 421.

18 The Boston, 1 Gall. 243; The Hoop, 1 C. Rob. 165.

19 The Joseph, 8 Cranch, 454; The Hoop, 1 C. Rob. 165; Potts *v.* Bell, 8 Term Rep. 543.

20 Jecker *v.* Montgomery, 18 How. 110; The Julia, 1 Gall. 603; The Jonge Pieter, 4 C. Rob. 79; The Alexander, 1 Gall. 532; 8 Cranch, 169; The Rapid, 8 Cranch, 155; Milne *v.* Mayor &c. of New York, 2 Paine, 429.

21 The Bermuda, 3 Wall. 554; Jecker *v.* Montgomery, 18 How. 111; 13 How. 498; The Julia, 8 Cranch, 200; The Jonge Pieter, 4 C. Rob. 79; The Indian Chief, 3 C. Rob. 22; The Peterhoff, 5 Wall. 54, distinguishing The Stert, 4 C. Rob. 65. And see The Ocean, 5 C. Rob. 84, 297; The Joseph, 1 Gall. 545.

22 The Louisiana, 3 Wall. 164; The Springbok, Blatchf. Pr. 454; The Thompson, 3 Wall. 164; The Thomyris, Edw. Adm. 17; The Maria, 5 C. Rob. 325; The Maria, 6 C. Rob. 201; The Charlotte Sophia, 6 C. Rob.

204; The Peterhoff, 5 Wall. 54; The William, 5 C. Rob. 349; The Joseph, 1 Gall. 545; 8 Cranch, 451; The Stephen Hart, Blatchf. Pr. 408; The Jonge Pieter, 4 C. Rob. 79; Jecker v. Montgomery, 18 How. 111; The Richmond, 5 C. Rob. 290; The Bermuda, 3 Wall. 514.

23 The Bermuda, 3 Wall. 554; The William, 5 C. Rob. 349; The Stephen Hart, Blatchf. Pr. 409; The Maria, 5 C. Rob. 325 But see The Polly, 3 C. Rob. 361.

24 The Liverpool Packet, 1 Gall. 513.

25 The Joseph, 8 Cranch, 451; 1 Gall. 545.

26 Mitchell v. Harmony, 13 How. 115; 1 Blatchf. 549.

§ 423. What is contraband.—Articles manufactured and primarily or ordinarily intended for military purposes[1] are contraband; also military supplies,[2] implements and munitions of war;[3] neutral property destined for the use of the army or navy.[4] Articles which may be for purposes of war or peace are contraband only when actually destined to military or naval use.[5] Articles exclusively used for peaceful purposes are not contraband, but liable to seizure for violation of blockade or siege.[6] Provisions are not generally contraband, but may become so on account of particular situation or destination;[7] they are not if destined for ordinary use, but otherwise if destined for military use,[8] even though destined to a neutral country.[9] So provisions and liquors, fit for the consumption of the army and navy, are contraband.[10] Fat cattle are provisions or munitions of war,[11] but live fowls are not embraced within the term live-stock.[12] Money or bullion destined for hostile use or the purchase of hostile supplies is contraband.[13] Naval stores, such as masts,[14] ship timbers,[15] hemp,[16] sail cloth,[17] cordage,[18] pitch and tar,[19] and copper in sheets,[20] are contraband if found on board a vessel which has a hostile destination. Rosin,[21] tallow,[22] and timber[23] are contraband only in case it may be presumed that they are intended to be used for purposes of war. The probable use of an article is inferred from its destination.[24] Contraband persons are soldiers and sailors in the service of the enemy,[25] officers, whether military or civil, sent out on the public service of the enemy at the public expense—the number of such being immaterial.[26]

1 The Peterhoff, 5 Wall. 28; Blatchf. Prize, 463; The Charlotte, 5 C. Rob. 272; Neptunus, 3 C. Rob. 108; The Drie Gebroeders, 5 C. Rob. 305; The Commercen, 1 Wheat. 382.

2 The Tubal Cain, Blatchf. Prize, 240.

3 The Peterhoff, Blatchf. Prize, 463.

4 The Stephen Hart, Blatchf. Prize, 406; The Commercen, 1 Wheat. 382; The Peterhoff, Blatchf. Prize, 506.

5 The Neptunus, 3 C. Rob. 108; The Drie Gebroeders, 5 C. Rob. 305.

6 The Peterhoff, 5 Wall. 28; Blatchf. Prize, 463.

7 The Peterhoff, 5 Wall. 58; Blatchf. Prize, 463; The Commercen, 1 Wheat. 382.

8 The Commercen, 2 Gall. 261; 1 Wheat. 382; Ten Hogsheads of Rum, 1 Gall. 188; The Jonge Margaretha, 1 C. Rob. 189.

9 The Commercen, 2 Gall. 264; The Antonia Johanna, 1 Wheat. 159; The Friendschaft, 4 Wheat. 105; 3 Ibid. 14; The Jonge Margaretha, 1 C. Rob. 189.

10 Maisonnaire *v.* Keating, 2 Gall. 325; The Stephen Hart, Blatchf. Prize, 387; The Springbok, Ibid. 434; The Peterhoff, Ibid. 463.

11 The Haabet, 2 C. Rob. 182; The Jonge Margaretha, 1 C. Rob. 191; The Ranger, 6 C. Rob. 125; The Edward, 4 C. Rob. 68.

12 U. S. *v.* Sheldon, 2 Wheat. 122; U. S. *v.* Barber, 9 Cranch, 243.

13 The Matilda A. Lewis, 5 Blatchf. 522; Evans *v.* Hutton, 6 Jur. 1042.

14 U. S. *v.* Diekelman, 92 U. S. 620.

15 The Charlotte, 5 C. Rob. 305; The Staadt Embden, 1 C. Rob. 27.

16 The Twende Brodre, 4 C. Rob. 33.

17 The Apollo, 4 C. Rob. 161; The Evert, Ibid. 354; The Gute Gesellschaft Michael, Ibid. 94.

18 The Neptunus, 3 C. Rob. 108.

19 The Peterhoff, Blatchf. Prize, 463; 5 Wall. 28.

20 The Jonge Tobias, 1 C. Rob. 329; The Twee Juffrowen, 4 C. Rob. 242; The Neptunus, 6 C. Rob. 408.

21 The Charlotte, 5 C. Rob. 275.

22 Nostra Signora de Begona, 5 C. Rob. 98.

23 The Neptunus, 3 C. Rob. 108.

24 The Twende Brodre, 4 C. Rob. 37.

25 The Friendship, 6 C. Rob. 420.

26 The Orozembo, 6 C. Rob. 430.

§ 424. Carrying enemy dispatches.—Carrying dispatches to the enemy is a trading with the enemy,[1] and a cause for condemnation.[2] So, carrying dispatches from a colony of an enemy to the mother country subjects to confiscation.[3] The enemy's dispatches on board a neutral vessel, which has a hostile destination, are contraband.[4] The court only regards as criminal in a neutral vessel the carrying of letters or dispatches of a public nature from or to a belligerent port.[5] Any official communications between officers, military or civil, in the service of the enemy, on the public affairs of their government, are "enemy's dispatches."[6] Official communications between the enemy's home government and his embassador or consul resident in a neutral state, alone excepted.[7] So, official communications between the enemy's officers and neutral foreign governments are not contraband, and private letters between individuals are presumed to be innocent, in the absence of all proof to the contrary.[8] A mail-bag belonging to and under the official seal of a neu-

tral government, found on board the prize vessel, was ordered to be delivered to the district-attorney to be disposed of conformably to instructions of the government.[9] In carrying dispatches from one port of an enemy country to another, greater vigilance is required of the master than in going from a neutral port to an enemy port.[10]

1 The Commercen, 2 Gall. 264; 1 Wheat. 382; The Madonna del Burso, 4 C. Rob. 169; The Sarah Christina, 1 C. Rob. 237; The Haase, Ibid. 286; The Emanuel, Ibid. 296; The Immanuel, 2 C. Rob. 186; The Atlas, 1 C. Rob. 243; The Rising Sun, 2 C. Rob. 104; The Neutralitet, 3 Ibid.; The Welvaart, 1 C. Rob. 122; The Friendship, 6 C. Rob. 420; The Orozembo, 6 C. Rob. 430; The Caroline, 6 C. Rob. 461; The Tulip, 3 Wash. C. C. 181; The Atalanta, 6 C. Rob. 440; U. S. *v.* The Tulip, Fish. Pr. 23; The W. B. Latimer, 4 Dall. 3; Potts *v.* Bell, 8 Term Rep. 543. But see The Hoop, 1 C. Rob. 165; The Dordrecht, 2 C. Rob. 69.

2 The Tulip, 3 Wash. C. C. 181; The Caroline, 6 C. Rob. 463.

3 The Commercen, 2 Gall. 266; The Atalanta, 6 C. Rob. 440; The Constantia, 6 C. Rob. 321.

4 The Rapid, Edw. Adm. 228; The Constantia, 6 C. Rob. 461, note; The Susan, 6 C. Rob. 461, note; The Hope, 6 C. Rob. 463, note.

5 The Tropic Wind, Blatchf. Prize, 68; The Madison, Edw. Adm. 224; The Rapid, Ibid. 228.

6 The Tropic Wind, Blatchf. Prize, 68; The Caroline, 6 C. Rob. 461; The Caroline, 6 C. Rob. 465; The Atalanta, Ibid. 440.

7 The Caroline, 6 Rob. 465; The Madison, Edw. Adm. 224.

8 The Tropic Wind, Blatchf. Prize, 68; The Acteon, 2 Dods. 48; The Caroline, 6 C. Rob. 465.

9 The Peterhoff, Blatchf. Prize, 463; 5 Wall. 28.

10 The Rapid, Edw. Adm. 228; The Caroline, 6 C. Rob. 461. And see The Drummond, 1 Dods. 103.

§ 425. Penalty for carrying contraband.—In modern times, the carriage of contraband subjects only the freight and expenses to forfeiture,[1] except where the owner of the cargo is also the owner of the vessel;[2] or where the vessel had sailed with false papers and a false destination, when the vessel also will be condemned;[3] or in disregard of express treaty stipulations;[4] or under circumstances of fraud on the rights of belligerents.[5] The owner who permits the master to carry under false papers contraband goods, ostensibly for a neutral port, but really for the enemy, must suffer the consequences.[6] So, where the owner is privy to the transaction, or where his agent interposes actively in the fraud, and consents to cover it by sailing with false papers, the ship will also be condemned;[7] and the known character of the owners and their agents, as connected with contraband trade, is a circumstance to be considered upon the question of the regularity of the papers.[8] Non-contraband goods belonging to the same owner must share the fate of the contraband.[9]

10 The Liverpool Packet, 1 Gall. 519; The Richmond, 5 C. Rob. 290; The Jonge Margaretha, 1 C. Rob. 189; The Oster Reseer, 4 C. Rob. 199.

11 The Circassian, 2 Wall. 158; The Lizette, 6 C. Rob. 390; The Abby, 5 C. Rob. 251.

12 The Springbok, Blatchf. Prize, 463; 5 Wall. 1; The Peterhoff, Ibid. 509; The Imima, 3 C. Rob. 167; The Trende Sostre, 6 C. Rob. 390, note; The Columbia, 1 C. Rob. 154; The Neptunus, 2 C. Rob. 110; The Lizette, 6 C. Rob. 390; The Aurora, 4 C. Rob. 218; The Eugen, 1 Wheat. 62.

13 The Stephen Hart, Blatchf. Prize, 432; The Springbok, Ibid. 463; 5 Wall. 1.

14 The Orozembo, 6 C. Rob. 430. The master is bound to know the contents of the cargo—The Peterhoff, 5 Wall. 509; The Springbok, Blatchf. Prize, 453; The Stephen Hart, Blatchf. Prize, 432; The Oster Roeser, 4 C. Rob. 199.

15 The Susan, 6 C. Rob. 461, note.

16 The Eleonora Wilhelmina, 6 C. Rob. 331.

17 The Drummond, 1 Dods. 103.

18 The Asia, 6 C. Rob. 403.

§ 426. Blockade.—A belligerent engaged in actual war has a right to blockade the ports of the other belligerent, and neutrals are bound to respect that right.[1] To justify the exercise of the right, a war must exist *de facto*, and this exists where one of the belligerents claims sovereign rights as against the other.[2] The United States as an independent nation has power to declare what ports within her limits shall be ports of entry, and to confine all maritime trade to them.[3] The Supreme Court regards treaty compacts as the true exposition of the law of nations in regard to blockades.[4] The President of the United States in time of war has the power to institute and declare a blockade,[5] or to relax a blockade and regulate the trade with places in the military possession of the Government.[6] A blockade may be instituted to prevent ingress only or egress only,[7] and of one port, or several ports, or the whole seaboard of the enemy.[8] A simple blockade may be established by a naval officer acting upon his own discretion or under the directions of his superiors.[9] A public blockade is not only established in fact, but is notified by the government directing it, to other governments.[10] A blockade only exists where the forces of one nation encompass the ports of another,[11] and cannot exist where no actual blockade can be applied,[12] but must be justified by the necessary means of enforcing it.[13] The forces must be such as to constitute an actual investment[14] by an adequate force so stationed as to render ingress or egress of vessels dangerous,[15] although the occasional absence of the blockading vessels from stress of weather or other contingencies will not render it ineffectual.[16] So it will not be rendered ineffectual by continued entries in a log-

book supported by testimony of clear weather and of no blockading vessels being visible off the port from which the vessel sailed.[17] A blockade may be made effectual by batteries on shore as well as by vessels afloat.[18] A blockade is not to be extended by construction,[19] and no right exists on the part of a belligerent as against neutral powers to blockade his own ports.[20] A blockade is null and void *ab initio* if it includes any port or coast not belonging to the enemy.[21] So it is void if the blockading force abandon its position, except temporarily, on account of stress of weather,[22] or if it be driven away by a superior force,[23] or if it be inadequate to guard the whole line of the blockade,[24] or negligent in the execution of its duties,[25] or partiality.[26] A blockade does not, according to modern usage, extend to a neutral vessel found in port, nor prevent her coming out with the cargo which was on board when the blockade was instituted.[27] A blockade is presumed to continue till revocation and actual notice of discontinuance.[28] The blockade of a coast is not terminated by the discontinuance of a blockade of a port on that coast.[29] The military occupation of a city by a blockading belligerent does not terminate the public blockade previously existing.[30]

1 Prize Cases, 2 Black, 635; McCall *v.* Mar. Ins. Co. 8 Cranch, 59.

2 Prize Cases, 2 Black, 635; The Mary Clinton, Blatchf. Prize, 556.

3 U. S. *v.* The William Arthur, 3 Ware, 276.

4 The Empress, Blatchf. Prize, 179; Fitzsimmons *v.* Newport Ins. Co. 4 Cranch, 185.

5 The Tropic Wind, 14 Law Rep. N. S. 144; Semmes *v.* The City F. Ins. Co. 6 Blatchf. 456; Prize Cases, 2 Black, 635; The Hiawatha, Blatchf. Prize, 13; U. S. *v.* The W. F. Johnson, 18 Leg. Int. 334.

6 The Alma, 15 Law Rep. N. S. 663. The President's instructions of 28th August, 1812, did not protect from capture vessels coming from an enemy's port with cargoes put on board long after full knowledge of the war—The Joseph, 1 Gall. 562; The Alexander, Ibid. 532; 8 Cranch, 169.

7 The Gerasimo, 11 Moore P. C. 115.

8 The Franciska, Spinks, 117; Naylor *v.* Taylor, Moody & M. 207.

9 The Circassian, 2 Wall. 135.

10 The Circassian, 2 Wall. 135.

11 U. S. *v.* The William Arthur, 3 Ware, 276.

12 The Peterhoff, 5 Wall. 55; The Stert, 4 C. Rob. 65.

13 The Nayade, Newb. 372; The Neutralitet, 3 C. Rob. 295.

14 The Sarah Starr, Blatchf. Prize, 87; The Nornen, Spinks, 171; The Franciska, Ibid. 113.

15 The Sarah Starr, Blatchf. Prize, 69; The Nornen, Spinks, 171.

16 The Sarah Starr, Blatchf. Prize, 69; The Nornen, Spinks, 171.

17 The Andromeda, 2 Wall. 401; The Balgorry, 2 Wall. 474.

18 The Circassian, 2 Wall. 135.

19 The Peterhoff, 5 Wall. 52; The Frau Ilsabe, 4 C. Rob. 63; The Maria, 6 C. Rob. 201; The Zelden Rust, Ibid. 93.

20 The Circassian, 2 Wall. 157; The Lizette, 6 C. Rob. 390.

21 The Franciska, Spinks, 117.

22 The Nancy, 1 Act. 57; The Columbia, 1 C. Rob. 154.

23 The Hoffnung, 6 C. Rob. 112; The Triheten, Ibid. 65.

24 The Betsy, 1 C. Rob. 93.

25 The Juffrow Maria Schroeder, 3 C. Rob. 152.

26 The Success, 1 Dods. 135; The Fox, Edw. Adm. 320; The Rolla, 6 C. Rob. 372; The Franciska, Spinks, 292.

27 Olivera *v.* Union Ins. Co. 3 Wheat. 183.

28 The Circassian, 2 Wall. 150; The Betsey, 1 C. Rob. 78; The Neptunus, 1 C. Rob. 170.

29 The Baigorry, 2 Wall. 474; The Josephine, 3 Ibid. 83.

30 The Circassian, 2 Wall. 135; The Baigorry, Ibid. 474.

§ 427. Notice of blockade.—Notification of blockade to the proper authorities of the State, and sufficient time to communicate the same to subjects or citizens of the State, is sufficient to constitute constructive notice.[1] The neutral master cannot be heard to say that he was ignorant of the blockade.[2] So, common notoriety is sufficient notice of blockade.[3] Any notification which declares under blockade a larger extent of coast than is actually blockaded, is null and void.[4] So, if the notice is that the blockade is *about* to be instituted.[5] The mere fact of the presence of the blockading squadron constitutes notice of blockade outwards to every vessel within the line of the blockade.[6] Direct warning from a belligerent cruiser, or knowledge from any other source, imparts an actual notice of the blockade inwards.[7] After which, persistence in her course, or in loitering about, will subject the vessel to detention.[8] Warning becomes unnecessary only where knowledge is had.[9] So, a warning indorsed on the register of the vessel is not necessary when actual notice to the master or owner is given.[10] Where knowledge of a blockade exists at the commencement of a voyage, the vessel cannot lawfully approach the blockade port even for the *bona fide* purpose of inquiring as to the continuance of the blockade.[11] The approach to a blockaded port is, under the circumstances, illegal,[12] and is in itself a consummation of the offense.[13] The inquiry cannot be made at the blockaded port if it can be made elsewhere.[14] A vessel approaching a blockaded port with intention to violate the blockade, is not entitled to be warned off.[15] Where an excuse is set up for approaching a blockaded port to make inquiry, satisfactory evidence

of ignorance of blockade must be adduced.[16] In the absence of notice of a blockade an inquiry at a blockaded port was excused.[17] Although it is a duty to make inquiry in the neighborhood, if information be attainable, respecting a continuance of the blockade, yet the general rule may be mitigated, and a vessel may lawfully sail for a blockaded port, knowing it to be blockaded, without being liable for a breach.[18]

1 The Hiawatha, Blatchf. Pr. 1; The Calypso, 2 C. Rob. 298; The Neptunus, 2 C. Rob. 113; The Adelaide, 3 C. Rob. 281; The Jonge Petronella, 2 C. Rob. 131; The Spes and Irene, 5 C. Rob. 79. And see Prize Cases, 2 Black, 635; The Mary Clinton, Blatchf. Pr. 556.

2 The Hiawatha, Blatchf. Pr. 18; The Neptunus, 2 C. Rob. 110.

3 The Franciska, Spinks, 299; The Tutela, 6 C. Rob. 177.

4 The Henrick and Maria, 1 C. Rob. 146; The Franciska, Spinks, 117.

5 The Franciska, Spinks, 117.

6 The Vrow Judith, 1 C. Rob. 150.

7 The Columbia, 1 C. Rob. 154; The Franciska, Spinks, 290; The Tutela, 6 C. Rob. 177.

8 The Apollo, 5 C. Rob. 289; Fitzsimmons *v.* Newport Ins. Co. 4 Cranch, 198.

9 The Nayade, Newb. 370; Yeaton *v.* Fry, 5 Cranch, 335; Maryland Ins. Co. *v.* Wood, 7 Ibid. 402.

10 The Hiawatha, Blatchf. Pr. 21; Prize Cases, 2 Black, 635; The Revere, 2 Sprague, 117; The Hallie Jackson, Blatchf. Pr. 41; The Columbia, 1 C. Rob. 154.

11 The Delta, Blatchf. Pr. 141, 654; The Cheshire, Ibid. 151; The Empress, Ibid. 146, 175, 659; Stokely *v.* Smith, 1 Ben. 411; The Spes and Irene, 5 C. Rob. 72; The Betsey, 1 C. Rob. 78; The Little William, 1 Act. 141; The Neptunus, 2 C. Rob. 110.

12 The Admiral, 3 Wall. 615; The Circassian, 2 Wall. 135; The Panaghia Rhomba, 12 Moore P. C. 168; Madeiros *v.* Hill, 8 Bing. 231; The Neptunus, 2 C. Rob. 110; but not where there was no intent—The Admiral, 3 Wall. 603; 3 Wall. Jr. 361; Medeiros *v.* Hill, 8 Bing. 231.

13 The Cheshire, 3 Wall. 231; Blatchf. Pr. 151; The Delta, 3 Wall. 654; Blatchf. Pr. 133.

14 The Empress, Blatchf. Pr. 175; The Union, Spinks, 164.

15 The Hallie Jackson, Blatchf. Pr. 48; The Empress, Ibid. 175.

16 The Cheshire, Blatchf. Pr. 160; The Union, Spinks, 164.

17 The Forest King, Blatchf. Pr. 48; and compare The Empress, Ibid. 175.

18 Maryland Ins. Co. *v.* Woods, 6 Cranch, 29; 7 Ibid. 402.

§ 428. Attempt to violate blockade.—The attempt of a neutral vessel to enter or leave a blockaded port, with knowledge or notice of the blockade, is a culpable violation, although no warning is given;[1] and for such attempt the vessel and cargo may be condemned.[2] The cargo may be condemned, although the vessel has not been taken in process.[3] So if a vessel, however distant at time she was met with, sailed after notice of the blockade,

and still pursued her course to the blockaded port;[4] but not in default of notification.[5] If the destination of the vessel be hostile, the destination of the goods is considered hostile also, though they are intended to be forwarded beyond the hostile port, or be deposited at an intermediate neutral port.[6] Or if, before she is met with, the master abandons the destination;[7] but the change of course must be definite.[8] In case of such attempt, suspicious circumstances connected with the matter pleaded in justification will warrant a rigid scrutiny of the evidence offered.[9] The presumption of a hostile destination may be rebutted by clear proof of its abandonment.[10] A vessel may be in such a distress as to justify her in attempting to enter a blockaded port;[11] but nothing but a high necessity will justify the attempt,[12] an absolute and uncontrollable necessity;[13] and satisfactory evidence will be required of the reality and urgency of the necessity,[14] as for the necessity for water, fuel, or provisions.[15] The extra extent of the voyage renders probable the assertion that the vessel required further stores, and at all events removes the suspicion;[16] but the excuse of seeking a blockaded port to obtain supplies is looked upon with disfavor.[17] That the approach was made to ascertain whether the blockade was raised, will not avoid liability;[18] nor that the venture was not a commercial one;[19] nor of ignorance of the coast;[20] nor loss of compass; nor the desire to avoid fees payable at another port.[21]

1 The Louisa Agnes, Blatchf. Prize, 107; The Nayade, 1 Newb. 272; Fitzsimmons *v.* Neptune Ins. Co. 4 Cranch, 185. And see The Gipsey, Blatchf. Prize, 127; The Edward Barnard, Ibid. 122; The Advocate, Ibid. 142; The Revere, 2 Sprague, 107; The Ocean Bird, Ibid. 261.

2 The Balgorry, 2 Wall. 474; The D. Sargeant, Blatchf. Prize, 578; The General C. C. Pinckney, Blatchf. Prize, 278; The Ouachita, Ibid. 309; The Amiable Isabella, 6 Wheat. 1.

3 The Joseph H. Toone, Blatchf. Prize, 223, 641.

4 The Vrow Johanna, 2 C. Rob. 109; The Neptunus, Ibid. 111.

5 The Neptunus, 2 C. Rob. 111.

6 The Richmond, 5 C. Rob. 336; The Lizette, 6 C. Rob. 390, note.

7 The James Cook, Edw. Adm. 263; The Imima, 3 C. Rob. 170.

8 The Minerva, 3 C. Rob. 229.

9 The Diana, 7 Wall. 360; The Experiment, 8 Wheat. 261; The Juffrow Elbrecht, 1 C. Rob. 127; The Sea Witch, 6 Wall. 242.

10 The Imima, 3 C. Rob. 167; The Lizette, 6 C. Rob. 390, note.

11 The Diana, 7 Wall. 354.

12 The Argonaut, Blatchf. Prize, 63; The Fortuna, 5 C. Rob. 31; The Hurtige Hane, 2 C. Rob. 124.

13 The Diana, 7 Wall. 354; The Neptunus, 2 C. Rob. 111; The Comet, Edw. Adm. 32; The Courier, Ibid. 249.

14 The Major Barbour, Blatchf. Prize, 167; The Forest King, Ibid. 48; The Rising Dawn, Ibid. 368; The Sunbeam, Ibid. 656; The Albert, Ibid. 663; The Arthur, Edw. Adm. 202; The Diana, 7 Wall. 354; The Fortuna, 5 C. Rob. 27; The Christiansberg, 6 Ibid. 376; The Neptunus, 2 C. Rob. 110; The Hurtage Hane, Ibid. 124.

15 The Nayade, Newb. 374; The Fortuna, 5 C. Rob. 21; The Hurtage Hane, 2 C. Rob. 124; The Sunbeam, Blatchf. Prize, 316; The Diana, 7 Wall. 354.

16 The Forest King, Blatchf. Prize, 48; The Hurtage Hane, 2 C. Rob. 124.

17 The Argonaut, Blatchf. Prize, 62.

18 The Betsey, 1 C. Rob. 78; The Union, Spinks, 167; The Cheshire, 3 Wall. 235; The Shepherdess, 5 C. Rob. 267; The Apollo, Ibid. 287; The Posten, 1 C. Rob. 335, note; The Spes and Irene, 5 C. Rob. 72; The James Cook, Edw. Adm. 263.

19 The Exchange, Edw. Adm. 40; The Charlotta, Ibid. 253; The Arthur, Ibid. 202; The Elizabeth, Ibid. 198; The Fortuna, 5 C. Rob. 27; The Comet, Edw. Adm. 32; The Jeanne Maria, Spinks, 170.

20 The Adonis, 5 C. Rob. 257.

21 The Elizabeth, Edw. Adm. 198.

§ 429. Violation of blockade.—To constitute a violation of blockade three things are necessary to be proved: first, the existence of the blockade; second, the knowledge of the offending party; and third, some act of violation, either by going in or coming out with a cargo laden after the commencement of the blockade.[1] A vessel is not entitled to export a cargo after knowledge of the blockade, without clear proof that the act was honest and fair as to belligerent rights of captors;[2] or unless the cargo was put on board before the institution of the blockade;[3] and any vessel which passes, or attempts to pass out, except a vessel in ballast in the port at the time the blockade was first instituted, is liable.[4] If she overstays the time allowed by proclamation she is liable to capture, although she was prevented from leaving by an accident.[5] A breach of blockade inwards is committed by approaching a blockading squadron, and taking such a position as to facilitate her slipping into port, or getting under the cover of hostile forts;[6] or by a vessel found near the blockaded port, and observed to be steering for it.[7] Although it is possible the intention of the master may have been innocent, the presumption arising from his conduct may be inferred from the circumstances—being near the blockaded port, and within the line of blockading vessels by night; and the return voyage so timed that she may be there by night again; no attention paid to guns fired to bring her to, but crowding sail and running for the blockaded shore.[8] Although the terms of the proclamation afford no justification for the act of the master, they are entitled to consideration on the question of the intent with

4 The Hiawatha, Blatchf. Pr. 19; The Comet, Edw. Adm. 32; Olivera v. Union Ins. Co. 3 Wheat. 183; The Frederick Molke, 1 C. Rob. 86.

5 Prize Cases, 2 Black, 635.

6 The Neutralitet, 6 C. Rob. 31; The Charlotte Christin ., 6 C. Rob. 101.

7 The Mentor, Edw. Adm. 207; The Gute Erwarting, 6 C. Rob. 182; The Chrissys, Spinks, 343.

8 The Cornelius, 3 Wall. 225; The Charlotte Christine, 6 C. Rob. 101; The Mersey, Blatchf. Pr. 187.

9 The Empress, Blatchf. Pr. 659.

10 Fitzsimmons v. Newport Ins. Co. 4 Cranch, 185; Yeaton v. Fry, 5 Cranch, 335.

11 Olivera v. Union Ins. Co. 3 Wheat. 197; Fitzsimmons v. Newport Ins. Co. 4 Cranch, 185.

12 The John Gilpin, Blatchf. Pr. 291.

13 Fitzsimmons v. Newport Ins. Co. 4 Cranch, 185; The Nereide, 9 Cranch, 388.

14 The Empress, Blatchf. Pr. 175; Fitzsimmons v. Newport Ins. Co. 4 Cranch, 198; The Columbia, 1 C. Rob. 154; Fitzsimmons v. Newport Ins. Co. 4 Cranch, 185; The Coosa, Newb. 398; The Betsey, 1 C. Rob. 78. And see The Sea Witch, 6 Wall. 242; The Flying Scud, Ibid. 263; The Adela, Ibid. 266; The Wren, Ibid. 582.

15 The Nayade, Newb. 370; The Betsey, 1 C. Rob. 78.

16 The John Gilpin, Blatchf. Pr. 291; The Saunders, 2 Gall. 210.

17 The Josephine, 3 Wall. 83.

18 The Rising Dawn, Blatchf. Pr. 368.

19 The Peterhoff, 5 Wall. 28.

§ 430. Penalty for violation of blockade.—A breach of blockade, with knowledge or notice of its existence, subjects the property so employed to confiscation.[1] So the sailing with intent to violate a blockade subjects the vessel, and in most cases the cargo, to condemnation,[2] from the inception of the voyage.[3] A settled course of trade in violating the blockade, and the employment of the vessel before in such trade, and the fact that her claimant had before been engaged in such trade, may be taken into consideration on the question of intent.[4] The owners of the vessel are bound by the acts of the master, whether they were ignorant thereof or not.[5] The acts of the master will affect the cargo if laden on board after the blockade has become effective as to the vessel.[6] Where the owner of a cargo knows of the blockade when the vessel sails, he loses his cargo in case of capture.[7] So when the blockade was known or might have been known when the shipment was made, the master will be treated as agent of the cargo as well as of the ship,[8] and the owners of the cargo will be responsible for the acts of the master.[9] The deviation of the vessel into a blockaded port is presumed to be in the service of the cargo, and the owner is

bound except in the absence of notice of the blockade at the time the vessel sailed.[10] So where a part of the cargo belonged to neutrals, who had no notice of the blockade, it should be restored, without costs;[11] or if the owner of the cargo on a vessel liable to condemnation did not participate in the offense, his property is not liable to forfeiture.[12] By the modern rule, the penalty annexed to a breach of blockade is the forfeiture of the vessel and cargo taken *in delicto*, or before the end of the return voyage.[13] A vessel coming out of a blockaded port may be seized on her first voyage subsequent thereto.[14] So long as the blockade continues a vessel is liable for the breach until she has completed her voyage;[15] but she ceases to be liable as soon as the blockade is raised, although if already captured she is not to be released.[16] The act of egress is as culpable as the act of ingress, when done in fraud of a blockade.[17] In case of a simple blockade the captors are bound to prove its existence at the time of the capture, while in case of a public blockade the claimants are held to proof of its discontinuance to protect themselves from its penalties.[18]

1 The Hiawatha, Blatchf. Prize, 14; The Columbia, 1 C. Rob. 154.

2 The Circassian, 2 Wall. 135; The Louisa Agnes, Blatchf. Prize, 107; The Captain Spedden, Blatchf. Prize, 127; The Ella Warley, Ibid. 291; The Christiansberg, 6 C. Rob. 376; The Randers Bye, Ibid. 382. And see The Nayade, Newb. 366; The Sea Witch, 6 Wall. 242; The Flying Scud, Ibid. 263; The Adela, Ibid. 266; The Frederick Molke, 1 C. Rob. 86; Yeaton *v.* Fry, 5 Cranch, 335; The Columbia, 1 C. Rob. 154.

3 The Stephen Hart, Blatchf. Prize, 411; The Petershoff, Ibid. 506; The Imina, 3 C. Rob. 167; The Trende Sostre, 6 C. Rob. 390, note; The Richmond, 5 C. Rob. 290; The Maria, 5 C. Rob. 325; The William, 5 C. Rob. 439; The Nancy, 3 C. Rob. 122; The United States, Stu. V. Ad. 116; The Joseph, 1 Gall. 545; 8 Cranch, 431; The Columbia, 1 C. Rob. 154; The Neptunus, Ibid. 110; The Lizette, 6 C. Rob. 390; The Thomyris, Edw. Adm. 17; The Circassian, 2 Wall. 135. And see The Nayade, Newb. 366; The Jonge Pieter, 4 C. Rob. 79; Jecker *v.* Montgomery, 18 How. 111.

4 The William H. Northrop, Blatchf. Prize, 235; The Maria, Ibid. 283; The Ella Warley, Ibid. 288; The Belle, Ibid. 294; The Granite City, Ibid. 355.

5 U. S. *v.* The Malek Adhel, 2 How. 234; The Palmyra, 12 Wheat. 1; The Springbok, Blatchf. Prize, 462; The Columbia, 1 C. Rob. 154; The Vrow Judith, 1 C. Rob. 150; The Adonis, 5 C. Rob. 228; The Mars, 6 C. Rob. 79; Jecker *v.* Montgomery, 18 How. 111; The Stephen Hart, Blatchf. Prize, 430; The Bermuda, 3 Wall. 556; The Ranger, 6 C. Rob. 125; The Amy Warwick, 2 Sprague, 133; The Santissima Trinidad, 7 Wheat. 283; U. S. *v.* Palmer, 3 Wheat. 635; Dobree *v.* Napier, 3 Scott, 201.

6 The Hiawatha, Blatchf. Prize, 20; The Frederick Molke, 1 C. Rob. 86; The Vrow Judith, 1 C. Rob. 150; The Betsey, 1 C. Rob. 93; The Crenshaw, Blatchf. Prize, 2; The Nereide, 9 Cranch, 450; The Adonis, 5 C. Rob. 228.

7 Stokely v. Smith, 2 Ben. 411; The Sunbeam, Blatchf. Prize, 635; Ibid. 316.

8 The William Bagaley, 5 Wall. 411; The James Cook, 1 Edw. Adm. 251; The Alexander, 4 C. Rob. 93; The Adonis, 5 C. Rob. 228; The Exchange, Edw. Adm. 39; Baltazzi v. Ryder, 12 Moore P. C. 168.

9 The Springbok, Blatchf. Prize, 462; Prize Cases, 2 Black, 635; The Amy Warwick, 2 Sprague, 123; The Peterhoff, Blatchf. Prize, 549; The Rosalie and Betty, 2 C. Rob. 343; The Aries, 2 Sprague, 198. But see The Nayade, Newb. 366; The Adonis, 5 C. Rob. 228.

10 The Sunbeam, Blatchf. Prize, 656; The Wave, Ibid. 330; U. S. v. The Joseph H. Toone, Ibid. 256.

11 The Crenshaw, Blatchf. Prize, 2.

12 The U. S. v. Guillem, 11 How. 62; The Alexander, 4 C. Rob. 93.

13 The Wren, 6 Wall. 582; The Saunders, 2 Gall. 215; The Imina, 3 C. Rob. 167; The Lisette, 6 C. Rob. 390; The Parraghia Rhomba, 12 Moore P. C. 168.

14 The Mersey, Blatchf. Prize, 195; The Christiansberg, 6 C. Rob. 376; The General Hamilton, Ibid. 61.

15 The Welvaart Van Pillaw, 2 C. Rob. 129; The General Hamilton, 6 C. Rob. 61; The Christiansberg, 6 C. Rob. 381.

16 The Lizette, 6 C. Rob. 387; The Conferenzrath, 6 C. Rob. 392.

17 The Hiawatha, Blatchf. Prize, 1; 2 Black, 635; The Frederick Molke, 1 C. Rob. 86; The Vrow Judith, Ibid. 151; The Neptunus, 1 C. Rob. 171.

18 The Circassian, 2 Wall. 135.

§ 431. Seizure and condemnation. — A capture made in good faith in neutral waters, without intention to violate neutral jurisdiction, and in the absence of all intervention and claim on the part of the neutral government, is valid.[1] The condemnation of prize property lying in the ports of an ally is justifiable, but a different rule applies to neutral ports.[2] No property vests in any goods taken at sea till a sanction of condemnation;[3] so in cases of illegal intercourse, the property must be condemned to the captors.[4] In cases not strictly prize, as for illegal captures in violation of neutrality, the courts will inquire into and decide the title, however complicated;[5] they will inquire in whom the property is vested, and not merely at what is called a legal title at common law.[6] The forfeiture imposed is absolute without reference to the time of seizure.[7] A sale of captured property by authority of the captors, if the property be afterward condemned, is valid.[8] A vessel and cargo taken for the use of Government on appraisal, at the place of capture, and afterward lost at sea, was condemned as prize.[9] The seizure of enemy property by the United States as prize of war on land *juri belli*, is not authorized by the law of nations, and can be upheld only by an act of Congress.[10] The Act of July 17th, 1862, excludes property on land

in the rebellion from the category of prize for benefit of captors.[11] A capture on land by boat crews sent from a public ship are held to come within the province of the prize courts.[12] It is competent for any person to take possession of property seizable as prize, when found within the jurisdiction of the court.[13] Any person may seize any property forfeited to the use of the Government, for the purpose of enforcing the forfeiture, and it depends on the Government whether it will act upon the seizure;[14] and it is not necessary that they should be taken by actual force.[15] A seizure of a vessel for violation of a blockade is lawful if made by a national vessel, though not a vessel forming part of the blockading force.[16] By the English practice, custom-house officers capture vessels in port as prize, and the seizure may be made even at the dock.[17] A vessel and cargo liable to capture as enemy's property, or for sailing under the enemy's license, or for illegal traffic, may be seized after her arrival in a port of the United States.[18]

1 The Adela, 6 Wall. 267; The Etrusco, 3 C. Rob. 31; The Vrow Anna Catharina, 5 C. Rob. 144; The Sir William Peel, 5 Wall. 517.

2 The Arabella, 2 Gall. 369; The Victoria, 1 Edw. Adm. 97; The Henrick & Maria, 4 C. Rob. 43; The Christopher, 2 C. Rob. 207; The Comet, 5 C. Rob. 255.

3 The Rose v. Himill, Bee, 304; Sasportas v. Jennings, 1 Bay, 470; Lindo v. Rodney, Doug. 613; Jecker v. Montgomery, 13 How. 517; The Susanna, 6 C. Rob. 48.

4 The Sally, 8 Cranch, 384: The Nelly, cited in 1 C. Rob. 219.

5 The Tilton, 5 Mason, 471; L'Invincible, 1 Wheat. 238; Talbot v. Janson, 3 Dall. 133; Del Col v. Arnold, Ibid. 333; The Alerta, 9 Cranch, 359; Nuestra Senora de la Caridad, 4 Wheat. 497; The Antelope, 10 Wheat. 66; 11 Ibid. 413; The Santa Maria, 7 Wheat. 490.

6 The Amy Warwick, 2 Sprague, 158; The Abo, Spinks, 42.

7 The Saunders, 2 Gall. 216; The Christiansberg, 6 C. Rob. 376.

8 Williams v. Armroyd, 7 Cranch, 423.

9 The Captain Spedden, Blatchf. Pr. 127.

10 U. S. v. Shares of Capital Stock, 5 Blatchf. 237; Indian Chf. 3 C. Rob. 12; La Virginie, 5 Ibid. 91; The Fama, Ibid. 97; Boedes Lust, Ibid. 207; Prudent, Ibid. 248; The Baltica, 11 Moore P. C. 141; U. S. v. Stevenson, 3 Ben. 121; U. S. v. The Francis Hatch, 13 Am. L. Reg. 289, citing U. S. v. Bushels of Wheat, cited 13 Am. L. Reg. 294. And see The Amy Warwick, 2 Sprague, 130; Brown v. U. S. 8 Cranch, 110; U. S. v. Stevenson, 3 Ben. 119.

11 Mrs. Alexander's Cotton, 2 Wall. 404. See Rev. Stats. sec. 4613.

12 The Charles F. Perry, 1 Low. 476; Lindo v. Rodney, Doug. 613; The Cotton Planter, 10 Wall. 577.

13 The Tropic Wind, Blatchf. Pr. 65; The Johanna Emilie, 20 Eng. L. & E. 562; The Rebekah, 1 C. Rob. 227; La Rosine, 2 C. Rob. 372; Brown v. U. S. 8 Cranch, 131; Malden v. Bartlett, Park. 105.

14 The Caledonian, 4 Wheat. 100; The Langdon Cheves, Ibid. 103.

15 Bales of Cotton, 1 Low. 11; The Wando, Ibid. 18.

16 The Memphis, Blatchf. Pr. 262; The Charlotte, 5 C. Rob. 272; 1 Dod. 212; The Donna Barbara, 2 Hagg. Adm. 366; The Melomane, 5 C. Rob. 43; The Douro, Blatchf. Pr. 362; 3 Wall. 564.

17 The Prince Leopold, Blatchf. Pr. 90; The Eliza Cornish, Spinks, Ec. & Ad. 36; The Conqueror, 2 C. Rob. 303.

18 The Caledonia, 4 Wheat. 100.

§ 432. Title to captured property.—Acquisitions made during war are considered as part of the domain of the conqueror,[1] and the title vests in the Government.[2] The seizure vests possession in the sovereign of the captors, and subjects the property to the jurisdiction of his courts,[3] whether the captured property belonged to an enemy or a neutral.[4] The Government takes the property not as droits, but solely *jure reipublicæ*.[5] Captures made by Government vessels belong to the Government, and no title vests in the captors, except to their distributive shares of the proceeds after condemnation.[6] A capture of a steamer within the insurrectionary district by the forces of the Government vests the title to the property in Government,[7] and subsequently coming into the United States and taking the prescribed oath does not divest the title.[8] The profits of capture made by individuals without a commission inure to the Government, but it has been the practice to assign the captors a part and sometimes the whole of the prize.[9] Cases may arise where the forfeiture will wholly accrue to the Government.[10] It is a matter of indifference whether the seizure proceeded originally from the Government, or has been adopted by it.[11] The title to the proceeds or value of the prize must conform to the conditions of the grant, which are that it shall be brought into port and condemned as lawful prize.[12] No subject can condemn hostile or captured property when the sovereign has prohibited it, but Government may subsequently ratify it.[13] Where the capture was collusive, the property was condemned to the Government.[14] The Government will not be debarred from asserting its rights to forfeiture by the misconduct of the captors after making the prize.[15] The provisions of the prize law apply to all captures made as prize by the authority of the United States.[16]

1 The Circassian, 2 Wall. 159; Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191; The Banda & Kirwee Booty, 1 Law Rep. Ad. & Ec. 109.

2 The Merrimac, Blatchf. Prize, 585; The Elsebe, 5 C. Rob. 155; The Ella Warley, Blatchf. Prize, 207, distinguishing the English rule in the Dos Hermanos, 10 Wheat. 306; 2 Ibid. 76.

3 The Invincible, 2 Gall. 36; Hudson *v.* Guestier, 4 Cranch, 293; 6 Ibid. 281; The Henrick and Maria, 4 C. Rob. 146.

4 The Invincible, 2 Gall. 36; Hudson *v.* Guestier, 4 Cranch, 293; 6 Ibid. 281; U. S. *v.* Peters, 3 Dall. 121.

5 The Siren, 13 Wall. 389; Dos Hermanos, 10 Wheat. 306; 2 Wheat. 76; The Joseph, 1 Gall. 555; 8 Cr. 431.

6 The Siren, 7 Wall. 163; The Aigburth, Blatchf. Prize, 635; Ibid. 665; The Dos Hermanos, 10 Wheat. 306; 2 Wheat. 76; The Adventure, 8 Cranch, 226; Bales of Cotton, 1 Low. 17.

7 White *v.* Red Chief, 1 Woods, 40.

8 White *v.* Red Chief, 1 Woods, 40.

9 The Siren, 1 Low. 282; Anonymous, 1 Opin. Atty-Gen. 463; The Dos Hermanos, 10 Wheat. 306; 2 Ibid. 76; The Banda & Kirwee Booty, 1 Law Rep. Ad. & Ec. 109.

10 The Gefia, 1 Mason, 99; The Walsingham Packet, 2 C. Rob. 77; The Siren, 1 Low. 280. And see Rev. Stats. sec. 4614.

11 The Emulous, 1 Gall. 566; The Aquila, 1 C. Rob. 32; The Twee Gesuster, cited 2 C. Rob. 284; The Rebeckah, 1 C. Rob. 227; The Gertrurda, 2 C. Rob. 211; The Melomane, 5 C. Rob. 43; The Charlotte, 5 C. Rob. 272; The Richmond, 5 C. Rob. 290; The Thorshaven, 1 Edw. Adm. 102.

12 Decatur *v.* Chew, 9 Law Rep. N. S. 138.

13 Prize Cases, 2 Black, 671; Brown *v.* U. S. 8 Cranch, 109.

14 The George, 2 Wheat. 283; 2 Gall. 249; The Bothnea and Jahnstoff, 2 Wheat. 169; Robinson *v.* Hook, 4 Mason, 156; The Experiment, 8 Wheat. 264.

15 The Louisa Agnes, Blatchf. Prize, 107.

16 Mrs. Alexander's Cotton, 2 Wall. 404; The Cotton Plant, 10 Wall. 577; Rev. Stats. sec. 4613.

§ 433. Effect of capture on prior liens.—The title must prevail, in a prize court, in priority to the subsidiary interest of lien-holders.[1] No lien upon enemy property can defeat the rights of the captors, unless in very particular cases, under general mercantile law, and independent of any contract between the parties.[2] All liens upon captured property, which are not in their nature open and apparent, are utterly disregarded by prize courts.[3] The capture discharges from all latent liens or incumbrances,[4] and from the liens of neutral creditors.[5] Where a neutral merchant had the legal title and possession, he was not to be deemed a lien-holder, but a trustee with right of retention until his advance should be repaid.[6] The capture overrides and supplants all private liens.[7] So, it overrides a mortgage;[8] nor can the holder of a bottomry bond assert his rights in a prize court;[9] so, the claim of the owner of the acquitted part to a lien on the condemned part was disallowed.[10] So, the Government has no priority from the operation of a municipal forfeiture over the rights of captors;[11] the forfeiture is absorbed in the general operation of the war.[12] Cotton captured as prize is not liable to be proceeded against for the internal revenue tax, while in custody of the marshal.[13] The capture overrides even a *bona fide* purchase by a neutral in his home port.[14]

1 The Amy Warwick, 2 Sprague, 155; The Hannah M. Johnson, Blatchf. Prize, 35; The Hampton, 5 Wall. 370; The Francis, 8 Cranch, 418; The Siren, 7 Wall. 162; The Marianna, 6 C. Rob. 22; The Battle, 6 Wall. 498. But see The Belvidere, 1 Dods. 356; The Vrow Sarah, 1 Dods. 355; The Constancia Harlessen, Edw. Adm. 232.

2 The Frances, 8 Cranch, 418; The Marianna, 6 C. Rob. 22.

3 The Hannah M. Johnson, Blatchf. Prize, 35; The Delta, Blatchf. Prize, 136; The Lynchburg, Blatchf. Prize, 52; The Francis, 1 Gall. 445; 8 Cranch, 354; The Velasco, Blatchf. Prize, 56; The Josephine, 4 C. Rob. 25; The Tobago, 5 C. Rob. 194; The Marianna, 6 C. Rob. 22; The Sisters, 5 C. Rob. 138; The Vrow Anna Catharina, 5 C. Rob. 144; The Aurora, 4 C. Rob. 218.

4 Harlan *v.* The Nassau, Blatchf. Prize, 199, 665.

5 The Sally Magee, Blatchf. 382; The Mary Clinton, Blatchf. Prize 556.

6 The Amy Warwick, 2 Sprague, 150; 14 Law Rep. N. S. 501.

7 Harlan *v.* The Nassau, Blatchf. Prize, 199; The Delta, Blatchf. Prize, 133; The Napoleon, Blatchf. Prize, 296; Jennings *v.* Carson, 4 Cranch, 2; The Amy Warwick, 2 Sprague, 155; The Tobago, 5 C. Rob. 194.

8 The Hampton, 5 Wall. 372; The Delta, Blatchf. Prize, 133.

9 The Mary, 9 Cranch, 126; The Frances, 8 Ibid. 418.

10 The Mary McRae, Blatchf. Prize, 91.

11 The Rapid, 1 Gall. 314; The Walsingham Packet, 2 C. Rob. 77; The Cornelius Maria, 5 C. Rob. 32; The Abby, 5 C. Rob. 251; The Recovery, 6 C. Rob. 341; The Sally, 8 Cranch, 312; The Sarah Starr, Blatchf. Prize, 84.

12 Prize Cases, 2 Black, 674; The Sally, 8 Cranch. 382.

13 The Victory, 2 Sprague, 226.

14 The Georgia, 7 Wall. 32.

§ 434. Rights of captors.—All rights of prize belong originally to the Government, and beneficial interests can be derived only from the grant of the Government;[1] and on failure of the title of the captors, the condemnation will be to the Government.[2] The grant embraces all property liable to be condemned as prize, and not particularly reserved.[3] The presumptions against the grant are only to be rebutted by language so explicit as to leave no room for doubt.[4] The property goes to the captors when authorized by the Government,[5] and the captors have a plenary dominion over it.[6] Their right depends exclusively on the commission[7] and instructions.[8] A non-commissioned cruiser may seize for the benefit of the Government,[9] though it must be considered as a mere merchantman.[10] Whether the capture was made without public authority and by a non-commissioned vessel is a question between the Government and the captors, with which the claimant has nothing to do.[11] The Prize Act of 26th June, 1812, operates as a grant of all property rightfully captured by commissioned privateers.[12] Immedi-

ately on capture of property on the high seas, the captors acquire such a right as no neutral can justly impugn or destroy.[13] They cannot be dispossessed by the force or tenor of subsequent captors.[14] Their right attaches to goods substituted for the prize of war,[15] but they have no such interest as entitles them to require the Government to press a claim for damages against a neutral Government in one of whose ports the prize was illegally recaptured.[16] Where the captors desire to take to their own use the property captured, its value is to be ascertained by sworn appraisal, and deposited in court or in the treasury, subject to the order of the court.[17] *Prima facie*, it will be assumed that reasonable cause existed for the commanding officer to take the captured vessel directly into the public service.[18]

1 The Joseph, 1 Gall. 555; The Elsebe, 5 C. Rob. 155; The Maria Francoise, 6 C. Rob. 282; Sterling *v.* Vaughan, 11 East, 619; The Emulous, 1 Gall. 565; Malden *v.* Bartlett, Parks, 105; Brown *v.* U. S. 8 Cranch, 131; The Anglia, Blatchf. Prize, 566.

2 Brown *v.* U. S. 8 Cranch, 132; The Etrusco, cited in 3 C. Rob. 31; The Walsingham Packet, 2 C. Rob. 77; The Emulous, 1 Gall. 566.

3 The Joseph, 1 Gall. 560; The Elsebe, 5 C. Rob. 155; The Nelly, 1 C. Rob. 165, note.

4 The Siren, 13 Wall. 392; The Elsebe, 5 C. Rob. 155.

5 Johnson *v.* Cases of Merchandise, Van Ness, 24; The Jonge Margaretha, 1 C. Rob. 189.

6 The Cosmopolite, 3 C. Rob. 269; The Fiad Oyen, 1 C. Rob. 135; Hopner *v.* Appleby, 5 Mason, 76.

7 The Joseph, 1 Gall. 545; 8 Cranch, 451.

8 Johnson *v.* Bales and Cas. of Mdse. 2 Paine, 620.

9 Carrington *v.* Merchants' Ins. Co. 8 Peters, 522; The Amiable Isabella, 6 Wheat. 1; The Dos Hermanos, 10 Wheat. 306; 2 Wheat. 76; The Melomane, 5 C. Rob. 43; The Elsebe, 5 C. Rob. 155; The Maria Francoise, 6 C. Rob. 282.

10 Pray *v.* The Recovery, Bee, 393, distinguishing Brown *v.* Franklyn, Carth. 474.

11 The Tropic Wind, Blatchf. Prize, 65; The Amiable Isabella, 6 Wheat. 1.

12 The Sally, 8 Cranch, 312.

13 McDonough *v.* Dannery, 3 Dall. 188.

14 The Mary, 2 Wheat. 123.

15 Proceeds of Prizes of War, Abb. Adm. 498; French Guiana, 2 Dods. 162; Ships Taken at Genoa, 4 C. Rob. 387; The Eole, 6 C. Rob. 224.

16 Stewart *v.* U. S. 1 Ct. Cl. 113.

17 The Ella Warley, Blatchf. Prize, 205, distinguishing The Euphrates, 1 Gall. 451; 8 Cranch, 384; The Diana, 2 Gall. 93.

18 The Joseph H. Toone, Blatchf. Prize, 231; Jecker *v.* Montgomery, 13 How. 498; 18 How. 111.

§ 435. Duties of captors.—It is the duty of captors to send the prize in for adjudication;[1] but they will be excused if they could not have done it without weakening the command so as to endanger the public service;[2] so when acting under the orders of the commander in chief not to weaken his force by detaching an officer and crew for the prize.[3] Where property has been captured on a remote station, or under circumstances calling for a removal, sale, or otherwise, on the ground of great inconvenience, the act has been held valid.[4] It is the duty of the captors to bring in the crew, or at least the master and principal officers of the prize for examination as witnesses.[5] The rule of the prize law is that the master and some of the crew of a prize vessel, must be brought in to be examined as witnesses to the facts attending the seizure,[6] and a failure to do so is fatal to the enforcement of the arrest,[7] and unless satisfactorily explained, sentence will be withheld.[8] It is the duty of the captors to bring the ship's papers into the registry, and to have examination of the principal officers and seamen of the captured ship, taken on the standing interrogatories.[9] All papers found on the prize are to be delivered to the court and deposited in the registry.[10] The custody of the papers of the captured vessel belongs exclusively to the prize court.[11] They must, immediately on arrival in port, deliver upon oath all the papers.[12] The omission to bring in the ship's papers must be satisfactorily accounted for.[13] In the first instance, only the ship's papers and preparatory examination can be adduced;[14] the officers and crew who are sent in as witnesses are not entitled to wages, witness fees, or compensation for their necessary detention from out of the prize property.[15]

1 Jecker *v.* Montgomery, 18 How. 111; Fay *v.* Montgomery, 1 Curt. 266; The Acteon, 2 Dods. 48.

2 Fay *v.* Montgomery, 1 Curt. 266; The Eleanor, 2 Wheat. 345.

3 Jecker *v.* Montgomery, 13 How. 498; Hudson *v.* Guestier, 4 Cranch, 293; Williams *v.* Armroyd, 7 Ibid. 423; The Arabella & Madeira, 2 Gall. 368; Slocum *v.* Mayberry, 2 Wheat. 11; The Sophie, 6 C. Rob. 138; The Falcon, Ibid. 194; The Nelson, Ibid. 229; La Dame Cecile, Ibid. 257.

4 The Arabella, 2 Gall. 372; The Peacock, 4 C. Rob. 185; The Eole, 6 C. Rob. 220; The Falcon, 6 C. Rob. 194; The Dame Cecile, 6 C. Rob. 257.

5 The Arabella, 2 Gall. 368; The Flying Fish, Ibid. 374; The Jane Campbell, Blatchf. 101; The Speculation, 2 W. Rob. 293; The Bothnea, 2 Gall. 88; The Eleanor, 2 Wheat. 346. But the rule will be dispensed with where there were no physical means of complying with it —The Actor, Blatchf. Pr. 200.

6 The Actor, Blatchf. Pr. 200; The Dame Catherine de Workeem, 1 Hay. & M. 244; The Elizabeth, Blatchf. Pr. 252.

7 The Actor, Blatchf. Pr. 200; The Henrick & Maria, 4 C. Rob. 43; The Dame Catherine de Workeem, 1 Hay. & M. 244. And see The Jane Campbell, Blatchf. Pr. 104; Arnold *v.* Del Col, Bee, 5; 3 Dall. 333.

8 The Bothnea, 2 Gall. 88; The Anna, 5 C. Rob. 332.

9 The Dos Hermanos, 2 Wheat. 76; The Sally Magee, 3 Wall. 451; The Sir William Peel, 5 Wall. 517. See Rev. Stats. Sec. 4615.

10 The London Packet, 1 Mason, 14; U. S. *v.* The Tulip, Fish. Pr. 17, distinguishing The Atalanta, 6 C. Rob. 440. The testimony is to be obtained direct from documents and witnesses found on board the vessel at the time of seizure, unless satisfactorily explained—The Zavala, Blatchf. Pr. 174; The Anna, 5 C. Rob. 332.

11 The Diana, 2 Gall. 93.

12 The Diana, 2 Gall. 93.

13 The Arabella, 2 Gall. 370; The Anna, 5 C. Rob. 332; The Flying Fish, 2 Gall. 376; The Speculation, 2 C. Rob. 293.

14 The Joseph H. Toone, Blatchf. Pr. 330; The Vigilantia, 1 C. Rob. 1.

15 The Lilla, 2 Sprague, 177; 15 Law Rep. N. S. 51; The Brittania, 2 Sprague, 225. Nor is the master entitled to be repaid disbursements made by him for the use of the vessel—The Velasco, Blatchf. Pr. 54; The Marianna, 6 C. Rob. 24.

§ 436. Obligations and responsibilities of captors.—Captors are bound to good faith and ordinary diligence, and are liable for ordinary negligence[1] only;[2] they are liable for fraud or negligence;[3] but not for an accident or casualty.[4] The goods are to be kept with the same caution with which a prudent person would keep his own property.[5] Any irregularities against the property seized will subject the captors to a disallowance of their right to the prize, and the positive infliction of punishment by penalties and costs.[6] They will be personally liable for goods embezzled, unless properly out of their possession at the time of the spoliation.[7] The right of bringing in a vessel for further examination and adjudication does not authorize or excuse any spoliation or damage; the captors are liable for all consequent injury or loss.[8] The burden is on the captor to show an overruling necessity for spoliation.[9] The commander of a cruiser is responsible in damages for the acts of all under his command, whether he himself is present or not; and this responsibility is not shifted on his superior officer unless he be actually present and cooperating, or has issued orders for doing the act in question.[10] On captures by public ships the actual wrong-doers are liable, except acts done in obedience to the orders of superiors.[11] A public officer, invested with certain discretionary powers, is not answerable for injury when acting within the scope of his authority, and not influenced by malice, corruption, and cruelty.[12] Imputations of mal-conduct, made against the officers and crew of a public vessel, may be referred to the prize commissioners

to ascertain if they were well founded, and report amount of injury received therefrom.[12]

1 The George, 1 Mason, 34; The Carolina, 4 C. Rob. 256; The Catharine and Anna, 4 C. Rob. 39; The Maria and Vrow Johanna, 4 C. Rob. 348. And see the William, 6 C. Rob. 316.

2 Burke *v.* Trevitt, 1 Mason, 102; The Sally, 8 Cranch, 382; Little *v.* Burreme, 2 Cranch, 170; Murray *v.* The Charming Betsey, 2 Cranch, 64; Imlay *v.* Sands, 1 Caines, 566; The Maria and Vrow Johanna, 4 C. Rob. 348; Maley *v.* Shattuck, 3 Cranch, 453; Gelston *v.* Hoyt, 3 Wheat. 246. But see the Apollon, 9 Wheat. 362; The Marianna Flora, 11 Wheat. 1; The Palmyra, 12 Wheat. 1.

3 Burke *v.* Trevitt, 1 Mason, 101; The Hoop, 1 C. Rob. 165; The Rendsberg, 6 C. Rob. 142. See Rev. Stats. sec. 5441.

4 Burke *v.* Trevitt, 1 Mason, 102; The Catharine and Anna, 4 C. Rob. 39.

5 Burke *v.* Trevitt, 1 Mason, 102; The Maria and Vrow Johanna, 4 C. Rob. 348.

6 The Jane Campbell, Blatchf. Prize, 101; The George, 1 Mason, 34; The Betsey, 1 C. Rob. 78; Fay *v.* Montgomery, 1 Curt. 266.

7 The Jane Campbell, Blatchf. Prize, 104; The Concordia, 2 C. Rob. 102; The Maria and Vrow Johanna, 4 C. Rob. 348; L'Eole, 6 C. Rob. 220; The Washington, Ibid. 275.

8 Del Col *v.* Arnold, 3 Dall. 333.

9 The Jane Campbell, Blatchf. Pr. 104; Arnold *v.* Del Col, Bee, 5; 3 Dall. 333.

10 The Mentor, 1 C. Rob. 179; The Diligencia, 1 Dods. 404; The Eleanor, 2 Wheat. 346; The Actæon, 2 Dods. 48.

11 The Louisa Agnes, Blatchf. Prize, 107; The Mentor, 1 C. Rob. 179; The Diligencia, 1 Dods. 404; The Eleanor, 2 Wheat. 345.

12 Wilkes *v.* Dinsman, 7 How. 129; Leglise *v.* Champante, 2 Strange, 820.

13 The Louisa Agnes, Blatchf. Prize, 114; The Jane Campbell, Ibid. 101.

§ 437. Sending to port of adjudication.—An officer seizing a vessel as prize is bound to commit her to the care of a competent prize-master and crew;[1] but this rule does not extend to a mere detention for examination.[2] If the commander is guilty of unnecessary delay in sending vessel and cargo in for adjudication, in the event of restoration, he will be liable for damages.[3] He should invite the master and crew to assist in navigating her to the port of adjudication,[4] but he is not justified in coercing them;[5] yet if they volunteer to do so, it is a waiver of a prize crew.[6] He should place under the command of the prize officer a prize crew, sufficient for the safe conduct of the vessel;[7] and, if possible, the vessel should be sent in in the same condition as when she was taken.[8] If the commander cannot spare a prize crew to navigate the vessel to a port of adjudication, he should release her;[9] but if there is clear proof that she belongs to the enemy, the commander may remove her crew and papers, and if

possible her cargo, and then destroy the vessel.[10] If the surveying officers report cargo in a condition not to be sent, it should be sold.[11] The port of adjudication should be capable of giving safe harborage to the vessel,[12] and be as near as possible to the place of capture.[13]

1 The Eleanor, 2 Wheat. 345.

2 The Eleanor, 2 Wheat. 345.

3 The Gerasimo, 11 Moore P. C. 107; The Susanna, 6 C. Rob. 51; The Peacock, 4 C. Rob. 190; Donaldson v. Thompson, 1 Camp. 429; The Purissima Concepcion, 6 C. Rob. 45; The Hendrik and Maria, 4 C. Rob. 43; The Polka, Spinks Pr. 57; The Comet, 5 C. Rob. 285; The Kierlighett, 3 C. Rob. 96; The Falcon, 6 C. Rob. 197; The Staadt Embden, 1 C. Rob. 27; The Fiad Oyen, 1 C. Rob. 135; The Christopher, 2 C. Rob. 209; The Betsy, Ibid. 210, note; The Anna, 5 C. Rob. 385; The Hunter, 1 Dods. 482.

4 The Resolution, 6 C. Rob. 21.

5 The Pennsylvania, 1 Act. 33.

6 The Alexander, 1 Gall. 539; The Resolution, 6 C. Rob. 13; Wilcocks v. Union Ins. Co. 2 Binn. 574.

7 The Resolution, 6 C. Rob. 21.

8 The Speculation, 2 C. Rob. 293; The Anna, 5 C. Rob. 373; The Flying Fish, 2 Gall. 374.

9 The Actæon, 2 Dods. 48; The John, Ibid. 336; The Felicity, Ibid. 336.

10 The John, 2 Dods. 336.

11 The Princessa, 2 C. Rob. 51. Compensation allowed to auctioneers —The Amy Warwick, 2 Sprague, 160; The Tubal Cain, Blatchf. Pr. 347. And see Rev. Stats. sec. 4650.

12 The Principe, Edw. Ad. 70; The Washington, 6 C. Rob. 276.

13 The Anna, 5 C. Rob. 385; The Catharina Elizabeth, 1 Act. 309; The Maryland, cited 1 Act. 310; The Peacock, 4 C. Rob. 190; The Hunter, 1 Dod. 482; The Wilhelmsberg, 5 C. Rob. 143.

§ 438. Duties of prize officer.—The prize officer is bound to the strictest care in navigating the vessel, for if loss accrues, in the event of restoration, the commander will be personally responsible in damages.[1] The omission to employ a pilot, in places where such employment is usual, is a want of care.[2] If he navigates the vessel directly to the place of adjudication, he is not responsible for mere accidents, or after-capture by the enemy;[3] but if navigated out of her course, and any accident accrues, he is liable for damages.[4] He should not subject the master and crew of the prize to any further restraint than may be necessary,[5] and clear necessity alone will justify him in putting them in irons.[6]

1 The William, 6 C. Rob. 316. And see, as to duties of prize-master, Rev. Stats. sec. 4617.

2 Der Mohr, 3 C. Rob. 129; 4 C. Rob. 315; The William, 6 C. Rob. 316; The Nemesis, Edw. Adm. 50; The Speculation, 2 C. Rob. 293.

3 The Carolina, 4 C. Rob. 256; The John, 2 Dods. 336.

4 The Susannah, 6 C. Rob. 48.

5 The Dispatch, 3 C. Rob, 279; The Lively, 1 Gall. 315; Die Fire Damer, 5 C. Rob. 357.

6 The St. Juan Baptista and Purissima Concepcion, 5 C. Rob. 35.

§ 439. Joint capture.—The right to share in the proceeds of the prize is confined to two classes of vessels—those making the capture, and those within signal distance of the vessel making the capture.[1] A vessel claiming to share in the proceeds must show that she was within signal distance in circumstances which might have justified the capturing vessel in demanding and expecting her assistance,[2] and so situated that she could have rendered assistance,[3] and ready and willing to assist.[4] The vessels must be in view of each other, so as to be able to receive and respond to signals correctly.[5] Co-operation in a common enterprise gives a claim, notwithstanding the vessel is not within signal distance.[6] In such case it is only necessary to show that the claiming vessel was one of the associates, and that the capture was made by them and within the purposes of the association, and actual position is unimportant,[7] as privity of purpose creates community of interest;[8] but public ships occupied in a common purpose, as in enforcing a blockade, do not share as joint captors when they are not present at the capture.[9] Joining in a chase or being in sight of a capture raises no presumption of participation.[10] So where the vessel was not in sight it was not a constructive capture.[11] She should be in sight not only of the capturing vessel, but also of the enemy.[12] The doctrine by which vessels in sight are permitted to share, is founded on the presumption that their presence contributed to the result; but this doctrine is modified and guarded by stringent rules respecting the kind and degree of evidence required.[13] The claiming vessel must show that the surrender was in fact partly owing to her presence and co-operation.[14] In case of joint capture, where there was an actual engagement,[15] it must be shown that the vessel was present at some period of the operations—at the commencement, intermediate stage, or at the surrender.[16] Where no actual assistance is alleged, the presumption of law leans in favor of the actual captor,[17] of takers, or those who actually take possession.[18] It is proper to consider as the capturing force not only the flag-ship, which in fact inflicted the damage received by the captured vessel, but also any other vessels which, by diverting the fire of the enemy, etc., contributed to the capture.[19] The act of Congress provides that in case of joint capture the capturing ships

14 The Selma, 1 Low. 32; L'Alerte, 6 C. Rob. 238, citing L'Hercule, Ibid. 239; La Gloire, Edw. Adm. 289.

15 The Cherokee, 2 Sprague, 248; L'Etoile, 2 Dods. 108.

16 The Cherokee, 2 Sprague, 246; The Empress, 1 Dods. 288; L'Etoile, 2 Dods. 108; The Naples Grant, 2 Dods. 273; The Aries, 2 Sprague, 265.

17 The Ella and Anna, 2 Sprague, 269; The Robert, 3 C. Rob. 194.

18 The Cherokee, 2 Sprague, 247; The Vryheid, 2 C. Rob. 16.

19 The Iron-Clad Atlanta, 3 Wall. 425; 3 Amer. Law Reg. N. S. 675. See Rev. Stats. sec. 4631.

20 The Despatch, 2 Gall. 1; Duckworth v. Tucker, 2 Taunt. 6. And see Rev. Stats. sec. 4632.

21 The Despatch, 2 Gall. 1; Roberts v. Hartley, Doug. 311.

22 The Merrimac, Blatchf. Prize, 584.

23 The Boston, 1 Sum. 344; La Belle Coquette, 1 Dods. 18; The John, 1 Dods. 363; The Galen, 2 Dods. 19; The Arthur, 2 Dods. 423.

§ 440. Conjunctive capture.—Conjunctive capture of enemy property on land, by both army and navy, is brought within the prize jurisdiction only by statute.[1] The right of vessels of the navy to prize-money exists only when sanctioned by Congress, and no such act gives prize to the navy in case of joint capture by the army and navy.[2] The capture by a joint expedition of the land and sea forces is not distributable in admiralty.[3] That is a conjunct expedition which is directed by competent authority, combining together the action of two different specific forces for the attainment of some specific purpose.[4] When there is no concert of action between the army and navy it is not a joint capture.[5] To establish a claim of joint capture on the part of an army there must be a contribution of actual assistance—the mere presence or being in sight is not sufficient.[6] In cases of combined land and naval captures it must appear that the naval forces contributed directly to the capture.[7] It is only in favor of crews of naval vessels or privateersmen that the right of prize exists, it does not apply to captures by land forces.[8]

1 U. S. v. Bales of Cotton, Woolw. 236; The Buenos Ayres, 1 Dods. 28; Pieces of Mdse. 2 Sprague, 233; Slocum v. Wheeler, 1 Conn. 429; The Army of the Deccan, 2 Knapp, 152; The Oester Ems, 1 C. Rob. 273.

2 The Siren, 13 Wall. 389.

3 The Siren, 13 Wall. 396; The Maria Francoise, 6 C. Rob. 282; The Hoogskarpel, 1 Dods. 446; Genoa and its Dependencies, 2 Dods. 446.

4 The Siren, 13 Wall. 395; Booty in The Peninsula, 1 Hagg. Adm. 39.

5 The Gondar, Blatchf. Pr. 267; The Dordrecht, 2 C. Rob. 69.

6 The Dordrecht, 2 C. Rob. 69.

7 U. S. v. Bales of Cotton, 15 Law Rep. N. S. 451.

8 U. S. v. The Active, 2 Car. Law Rep. 192; 5 Am. L. J. 543; 3 Wheel. C. C. 264.

§ 441. Distribution of prize-money.—The doctrine of reasonable or equitable reward has no place in an inquiry as to the distribution of prize-money to national vessels under the statutes on that subject.[1] The ship, captain, officers, and crew are joint tenants of the right to the capture, and whatever is acquired in consequence of this joint right is common stock.[2] The ship is figuratively considered as an agent, and represents the owners.[3] Where several vessels are to share in the prize-money, under the act of Congress, the commander of each ship is entitled to one-tenth awarded to his ship, if she was a vessel under the command of the commanding officer of the squadron, fleet, or division; and to three-twentieths, if his ship was acting independently of such officer.[4] The flag officer in command, whether by direct appointment or by devolution in the course of the service, is entitled to receive the flag eighth;[5] but he is not entitled to a share when separated from his command,[6] nor after transferring command to his successor,[7] nor while the captain of the flag ship was detached on account of illness.[8] The commander of a squadron is entitled to one-twentieth of all prizes made by a ship of war attached to his command, although the other part of the squadron may never have sailed on the cruise;[9] to deprive him of his flag twentieth, it is indispensable that some local station should have been assigned him.[10] The captain of the capturing ship is entitled to three-eighths of the prize, and in joint captures they are to be equally distributed among all the officers of that rank.[11] A captain of a privateer is, as to his crew, a trustee for their exclusive benefit, and cannot award any part to himself.[12] An officer of a fleet absent without leave, is not entitled to share in prizes made during his absence;[13] so, where the cruise was broken up by desertion, and a new cruise undertaken, no persons not engaged in the second cruise are entitled to share in the prizes made in that cruise.[14] Where the period of a cruise expired in a foreign port, and new articles were signed for the return voyage, the crew were entitled to share in prizes made after the departure for the home port.[15] Seamen on shore by captain's order are entitled to a share of prize-money, though on shore when prize was taken.[16] The claim of a mariner for a share of the prize was rejected where a disability occurred after signing the articles, but before the cruise began, and he was discharged at the home port with his own consent.[17] To entitle the officers and crew of a vessel to the whole of the property secured as lawful prize, it must appear that the vessel captured is of equal or superior force with the vessel making the cap-

ture.[18] Where a prize was captured by a United States transport ship, and the prize vessel was of inferior force, the case was referred to a commissioner to report the relative compensation properly allowable to parties engaged.[19] Where the prize is sold, and the money lies in the hands of the marshal, the persons entitled have a remedy at law for money had and received, or by supplemental libel against the marshal.[20] Parties entitled to a distributive share of proceeds, may file their libel and attach the proceeds when no formal adjudication has been had, or may compel the captors to proceed to condemnation of the proceeds.[21] A moiety of prize goods brought in by ships of war belongs to the Navy Pension Fund.[22] The distribution of prize-money is not altered by the Prize Act of June 30th, 1864, in cases pending at the date of the act.[23] The law is a conditional grant by Congress, and as soon as the conditions are fulfilled the grant becomes absolute,[24] and the proceeds can be distributed only according to direct and positive authority of law.[25] The officers and crew of a United States man-of-war are not entitled to share in the prize fitted out in a loyal State and condemned on the instance side of the court.[26]

1 The Anglia, Blatchf. Pr. 566; The Atlanta, 3 Wall. 425; Jones v. Shore, 6 Wheat. 462; Van Ness v. Buel, 4 Wheat. 74; Rev. Stats. sec. 4631.

2 Keane v. The Gloucester, 2 Dall. 36; Bee, 399; Rev. Stats. secs. 4631-4633.

3 Keane v. The Gloucester, 2 Dall. 36; Bee, 399.

4 Distribution of Prize Money, 11 Opin. Att-Gen. 148.

5 Decatur v. Chew, 1 Gall. 511; Keith v. Pringle, 4 East, 262.

6 Decatur v. Chew, 1 Gall. 510; Holmes v. Rainier, 8 East, 502; Taylor v. Pawlat, 1 H. Black. 265; Pigott v. White, Ibid. 265, note; Johnstone v. Margetson, Ibid. 261; Nelson v. Tucker, 3 Bos. & P. 267; The Ann, 3 C. Rob. 54; The Orion, 4 C. Rob. 362; Harvey v. Clarke, 6 East, 220.

7 Claim of Wilkes, 11 Opin. Att-Gen. 9.

8 Claim of Wilkes, 11 Opin. Att-Gen. 9.

9 Decatur v. Chew, 1 Gall. 506. See Rev. Stats. secs. 4633-4637.

10 Decatur v. Chew, 1 Gall. 506.

11 The Despatch, 2 Gall. 3; Roberts v. Hartley, 1 Doug. 311.

12 The St. Lawrence, 2 Gall. 19.

13 Distribution of Ransom Money, 11 Opin. Att-Gen. 328.

14 Blanchard v. Haven, 1 Mason, 346.

15 The Brutus, 2 Gall. 550; Keane v. The Gloucester, 2 Gall. 36. On voyage commenced before hostilities—The General Parkhill, 19 Leg. Int. 13; The St. Lawrence, 2 Gall. 19.

16 Seamen v. The Fair American, Bee, 135; Mahoon v. The Glouces-ter, 2 Pet. Adm. 403.

17 Neilson v. The Laura, 2 Sawy. 244; Ex parte Geddings, 2 Gall. 56.

18 Chubb v. U. S. 12 Law. Rep. N. S. 55; The Sally, 8 Cranch, 382; The Selma, 1 Low. 39; The Dos Hermanos, 10 Wheat. 306; The Hampton, 5 Wall. 376. See Rev. Stats. sec. 4630.

19 The Emma, Blatchf. Pr. 607.

20 Keane v. The Gloucester, 2 Dall. 36; Bee, 399.

21 Proceeds of Prize of War, Abb. Adm. 497; Ships taken at Genoa, 4 C. Rob. 387.

22 The Liverpool Hero, 2 Gall. 184. See Rev. Stats. Sec. 3689.

23 Distribution of Prize Money, 11 Opin. Att-Gen. 102.

24 Distribution of Prize Money, 11 Opin. Att-Gen. 102.

25 The Merrimac, Blatchf. Pr. 564.

26 The Chapman, 4 Sawy. 501.

§ 442. A prize agent is responsible only for the proceeds which have come into his own hands, and not for those received by his co-agents.[1] If he pays over the proceeds pending an appeal, or an appeal improperly refused, he is liable therefor.[2] The act abolishing the office of prize agent relieved such agents of all responsibility to comply with their orders diverting distribution made subsequent to the passage of the law;[3] it was their duty to deposit prize-moneys in the treasury in conformity with the act.[4] A prize agent may insure for benefit of captors.[5]

1 Penhallow v. Doane, 3 Dall. 87.

2 Penhallow v. Doane, 3 Dall. 87.

3 Liability of Prize Agents, 5 Opin. Att. Gen. 142. And see Rev. Stats. sec. 2639.

4 Prize Agents, 5 Opin. Att. Gen. 266.

5 Seamano v. Loring, 1 Mason, 137; Sterling v. Vaughan, 11 East, 619.

§ 443. Salvage in lieu of prize-money.—A prize court is authorized to reward with salvage instead of prize, persons not in the navy who have rendered valuable assistance in making a capture.[1] So, salvage may be granted on recapture from the enemy.[2] The property must have been in possession, either actual or constructive, of the enemy.[3] The allowance is in the discretion of the court;[4] but it is not allowed merely for stopping a vessel going into an enemy's port;[5] but a rescue by superior force is within the rule.[6] Recaptures are cases of prize, as they are goods taken on the high seas, *jure belli*, out of the hands of the enemy, a circumstance affording *prima facie* evidence that it is his property.[7] If a commander recapture from an enemy a neutral vessel, not liable to condemnation as prize, he is not entitled to salvage, and should set her free to prosecute her voyage.[8] Where an American vessel was recaptured by an American privateer, the original owner was not entitled to resti-

tution on payment of salvage.[9] Salvage is demandable upon the recapture of property seized by pirates;[10] but it is not due for the rescue of neutral vessel from a belligerent who has taken possession for a supposed violation of a treaty or law of nations;[11] and no right accrues from an act which was unlawful.[12] The rule of reciprocity must be applied to the recapture of the property of friends.[13]

1 The Deer, 1 Low. 96; The Hope, Hay & M. 216; The Helen, 3 C. Rob. 224; The Progress, Edw. Adm. 210.

2 The Adeline, 9 Cranch, 244; The Star, 3 Wheat. 78; Clayton *v.* The Harmony, 1 Pet. Adm. 78; The Two Friends, 1 C. Rob. 228; Brevoor *v.* The Fair American, 1 Pet. Adm. 100, note; The Aquila, 1 C. Rob. 82; The Atalanta, 3 Wheat. 431; The Fanny, 1 Dods. 443; The Ann Green, 1 Gall. 293; The War Onskan, 2 C. Rob. 300; The Haase, 1 C. Rob. 286; Le Tigre, 3 Wash. C. C. 579; The Franklin, 4 C. Rob. 147. And see Rev. Stats. sec. 4652.

3 The Ann Green, 1 Gall. 289.

4 Three Bales of Cotton, 1 Low. 18; The Dos Hermanos, 10 Wheat. 306; 2 Wheat. 76; one-eighth allowed M. Moodie *v.* The Harriet, Bee, 131; Le Caux *v.* Eden, Doug. 594. And see *ante*, § 316.

5 The Ann Green, 1 Gall. 293, commenting on the Diana, 5 C. Rob. 58. And see The Packet de Bilboa, 2 C. Rob. 133; The Franklin, 4 C. Rob. 147.

6 The Ann Green, 1 Gall. 289.

7 The Adeline, 9 Cranch, 244. And see The Dove, 1 Gall. 585; The Aquila, 1 C. Rob. 37; The Franklin, 4 C. Rob. 147; The Carlotta, 5 C. Rob. 54; The Jonge Lambert, 5 C. Rob. 54, note.

8 The War Onskan, 2 C. Rob. 300.

9 The Star, 3 Wheat. 78.

10 Talbot *v.* Seaman, 1 Cranch, 28; Davison *v.* Sealskins, 2 Paine, 324.

11 Waite *v.* The Antelope, Bee, 233.

12 Talbot *v.* Seaman, 1 Cranch, 28.

13 The Adeline, 9 Cranch, 288; The Star, 3 Wheat. 91. And see The Adventure, 8 Cranch, 211; Coulon *v.* The Neptune, 2 Pet. Adm. 356.

§ 444. Ransom.—A ransom is not a recapture of the property, but a purchase of the right of the captors, or a relinquishment of all interest or benefit which the captors might acquire by adjudication in a prize tribunal,[1] without distinction as between a neutral and an enemy.[2] A friendly belligerent may take a ransom for property of a neutral,[3] and a bill of exchange given as a collateral security is a contract enforceable in a court of law.[4] An ally is bound by a ransom bill given by a co-belligerent.[5] The net proceeds of the cargo ransomed at the port of discharge, with the value of the vessel and wages of all persons belonging to the vessel, must contribute.[6] The officers of a fleet are respectively entitled to the same interest in ransom money, salvage, and bounty money that they are to prize money in a like case.[7]

1 Maisonnaire v. Keating, 2 Gall. 325.

2 Maisonnaire v. Keating, 2 Gall. 325.

3 Maisonnaire v. Keating, 2 Gall. 325.

4 U. S. v. The Ariadne, Fish. Pr. 43; Maisonnaire v. Keating, 2 Gall. 325; De Tastet v. Baring, 11 East, 265.

5 Miller v. The Resolution, 2 Dall. 15.

6 Girard v. Ware, Peters C. C. 142.

7 Distribution of Ransom Money, 11 Opin. Atty-Gen. 326. All ransom money is to be distributed as prize-money—Rev. Stats. sec. 4642.

§ 445. Assignment of prize property.—An assignment of prize property is good at common law, and after condemnation the title becomes, by a retroactive operation, perfect in the assignee.[1] The assignment passes a legal interest in subsequent shares after detail as a prize crew.[2] The assignee of prize property takes it not as a legal but as an equitable interest.[3] The assignee of a share in a prize is presumed to know the stipulations of the articles for the cruise, being put upon inquiry by the very terms of the assignment.[4] A parol assignment is void under the statute.[5]

1 Morrough v. Comyns, 1 Wils. 211; The Dash, 1 Mason, 6; The Sally, 1 Gall. 409. And see Rev. Stats. sec. 4643.

2 The Brutus, 2 Gall. 550; Morrough v. Comyns, 1 Wils. 211; The Sally, 1 Gall. 401.

3 The Dash, 1 Mason, 6.

4 The Brutus, 2 Gall. 526.

5 The Dash, 1 Mason, 4. And see Rev. Stats. sec. 4643.

§ 446. Restitution.—A prize which has been taken in violation of neutrality, and which is brought within the jurisdiction of the United States, will be restored.[1] But if authorized by the sovereign power, it is legal as between the parties; and if carried into the jurisdiction it cannot be recovered.[2] The United States have jurisdiction to inquire into the merits of the capture, and if, in their judgment, the captors are not entitled to condemnation, to award restitution, notwithstanding even a probable cause for the capture.[3] Neutral courts have no jurisdiction to award restitution.[4] No private person, not even a consul, can make claim for the restoration of property on the ground that the capture was made in neutral waters; it is to be made by the nation whose rights have been infringed.[5] Neither an enemy, nor a neutral acting the part of an enemy, can demand restitution on the sole ground of capture on neutral waters.[6] Claimants of cargo, not citizens or residents of the enemy's country, who left so soon as they could convert their property into funds, were entitled to restitution.[7] The correct practice is to

cree.[5] For the loss of port and damage done to the rest of the cargo, and the diminution in the produce from the loss of the market, damages are allowed.[6] Where the captors consented to restitution, demurrage for the time of detention was allowed [7]—demurrage and interest allowed.[8] Demurrage is given against captors for unjustifiable delay in proceeding to adjudication,[9] but no allowance is made for loss of profits.[10] The captors are substituted in the place of the original owners, and are liable for the freight of the cargo.[11] In case of restitution the neutral carrier is entitled to freight,[12] where the capture prevents the vessel from earning freight,[13] unless he be guilty of fraudulent or unneutral conduct, or is assisting the enemy in carrying on the war,[14] or is carrying contraband,[15] or engaging in coasting or colonial trade of the enemy,[16] or is guilty of fraudulent suppression or spoilation of papers.[17] Full freight will be decreed although only a part of the goods be saved if the loss is owing to the negligence of the prize master.[18] The captor takes *cum onere* and freight is in all ordinary cases a privileged lien.[19] It is not payable when the ship is lost by accident or superior force,[20] nor is it chargeable when cargoes are sent in for adjudication in a chartered transport.[21]

1 Chamberlain *v.* Chandler, 3 Mason, 243; LeCaux *v.* Eden, Doug. 594; Lindo *v.* Rodney, Doug. 613; Caton *v.* Burton, Cowp. 330; The Venus, 5 Wheat. 130; The St. Nicholas, 1 Wheat. 417; Dean *v.* Angus, Bee, 371; Rous *v.* Hassard, cited in 2 Doug. 602; Snell *v.* Faussat, 1 Wash. C. C. 275, note; Camden *v.* Home, 4 Term Rep. 382; 1 H. Black. 476; The Invincible, 2 Gall. 43; The Betsey, 1 C. Rob. 78.

2 The Thompson, 3 Wall. 162; Glass *v.* The Betsey, 3 Dall. 16.

3 British Consul *v.* The John L. Thompson, Bee, 144; Gibbs *v.* The Two Friends, 95; The Leucade, Sparks, 175; The Odessa, Ibid. 219; The Mercurius, 1 C. Rob. 80; Miller *v.* The Resolution, 2 Dall. 19; Hollingsworth *v.* The Betsey, 2 Pet. Adm. 330; The Nemesis, Edw. Adm. 50; The Hoppet, Ibid. 369; The Elizabeth, 1 Act. 13; The Ostsee, Spinks, 175.

4 The Lively, 1 Gall. 322; Murray *v.* The Charming Betsey, 2 Cranch, 64; Maley *v.* Shattuck, 3 Cranch, 458; Del Col *v.* Arnold, 3 Dall. 333.

5 The Lively, 1 Gall. 323; The Lucy, 3 C. Rob. 208; The Narcissus, 4 C. Rob. 17. And see The Catharine *v.* Dickinson, 17 How. 170; The Empire State, 2 Ben. 179.

6 The Lively, 1 Gall. 324, explaining LeCaux *v.* Eden, Doug. 594.

7 The Lively, 1 Gall. 325; The Zee Star, 4 C. Rob. 71; The St. Juan Baptista, 5 C. Rob. 36; The Corier Maritimo, 1 C. Rob. 241.

8 The Lively, 1 Gall. 324; Talbot *v.* Janson, 3 Dall. 133.

9 The Corier Maritimo, 1 C. Rob. 241; The Lacheman, 5 C. Rob. 152.

10 The Lively, 1 Gall. 324; Talbot *v.* Janson, 3 Dall. 133; Maley *v.* Shattuck, 3 Cranch, 458.

11 The Commercen, 1 Wheat. 382; The Frances, 8 Cranch, 418; The Société, 9 Cranch, 209; The Antonia Johanna, 1 Wheat. 159. But not if the property be ultimately bound to the market where the captors

carry the ship—The Ann Green, 1 Gall. 294; The Vrow Henrica, 4 C. Rob. 248.

12 The Commercen, 2 Gall. 264; 1 Wheat. 382; The Ann Green, 1 Gall. 294.

13 The Copenhagen, 1 C. Rob. 289.

14 The Commercen, 2 Gall. 264; 1 Wheat. 382.

15 The Commercen, 2 Gall. 264; 1 Wheat. 382; The Sarah Christina, 1 C. Rob. 237; The Mercurius, Ibid. 80.

16 The Commercen, 2 Gall. 264; 1 Wheat. 382; The Immanuel, 2 C. Rob. 186; The Anna Catharina, 4 C. Rob. 107; The Minerva, 3 C. Rob. 34.

17 The Commercen, 2 Gall. 264; 1 Wheat. 382.

18 The Der Mohr, 3 C. Rob. 129.

19 The Bremen Flagge, 4 C. Rob. 99; The Vrow Henrica, Ibid. 247.

20 The Saratoga, 2 Gall. 178; The Fortuna, Edw. Adm. 56.

21 The Undaunted, 2 Sprague, 194.

§ 448. Probable cause.—Prize courts deny damages or costs in cases of seizure made upon "probable cause,"[1] as probable cause justifies the capture.[2] Probable cause means less than evidence which would justify a condemnation,[3] and is a question of law.[4] Although restitution be ordered without further proof, it does not follow that the sending in was improper.[5] Appearances may be created by the act of the ship which may excite suspicion.[6] Lighter suspicions exonerate the captors, where the trade is with an enemy, than under other circumstances.[7] The coming from an enemy port without a license is a good probable cause to exempt the captors from damages.[8] So, where the vessel was found with a false destination, or under circumstances of deviation from her voyage.[9] It is not necessary, in order to constitute "probable cause," that the circumstances should be such as to make a *prima facie* case for condemnation.[10] If there is reasonable suspicion of illegal traffic, or a reasonable doubt as to the proprietary interest, the nature, character, or legality of the conduct of the parties, it is a proper case to submit for adjudication.[11] A decree of acquittal without a certificate of probable cause, and not appealed from, is conclusive that there was no justifiable cause for seizure.[12] Where there were circumstances sufficient to warrant suspicion, though not to warrant condemnation, damages and costs will not be awarded.[13] Where there is probable cause on an attempt to enter a blockaded port, the costs and expenses will be awarded in case of restitution.[14] On a question of proprietary interest on further proof, restitution was decreed, and costs and expenses ordered to be paid by claimant, by whose fault defective documents were put on board.[15] Where the circumstances excited a

reasonable suspicion the vessel and cargo were restored, including coin, and the costs apportioned between the vessel and the coin.[16] In cases where trade has been carried on with the enemy under license, the captor's expenses have been allowed where there seemed a color for their conduct.[17] A vessel which had been used by the enemy without the knowledge of her owners, and had been recaptured, was restored by consent with costs.[18]

1 The Henry C. Brooks, Blatchf. Prize, 99; The Thompson, 3 Wall. 155; Blatchf. Prize, 377; The La Manche, 2 Sprague, 207; The Evening Star, Blatchf. Prize, 382; The Velasco, Ibid. 54; The Jane Campbell, Ibid. 101.

2 Maisonnaire v. Keating, 2 Gall. 336; The Invincible, 1 Wheat. 238; 2 Gall. 28; The Marianna Flora, 3 Mason, 122; The Thompson, 3 Wall. 162; The George, 1 Mason, 24; The St. Antonius, 1 Act. 113; The St. Louis, 2 Dods. 210; Locke v. U. S. 7 Cranch, 339. And see Murray v. The Charming Betsey, 2 Cranch, 64; Little v. Barreme, 2 Cranch, 170; Maley v. Shattuck, 3 Cranch, 458.

3 The Thompson, 3 Wall. 162; Locke v. U. S. 7 Cranch, 339; The Ostsee, Spinks, 175.

4 The Gala Plaid, 1 Brown Adm. 7; The Rover, 2 Gall. 240.

5 The La Manche, 2 Sprague, 216; The George, 1 Mason, 24; The Mary, 9 Cranch, 126; The Apollon, 9 Wheat. 362; The Apollo, 4 C. Rob. 158.

6 The La Manche, 2 Sprague, 215; The Thompson, 3 Wall. 155; The Aline and Fanny, 10 Moore P. C. 491; The San Juan Nupumuceno, 1 Hagg. Adm. 266.

7 The Liverpool Packet, 1 Gall. 529; The St. Antonius, 1 Act. 113.

8 The Liverpool Packet, 1 Gall. 531.

9 The Rover, 2 Gall. 246; The Peacock, 4 C. Rob. 185; The St. Antonius, 1 Act. 113.

10 The La Manche, 2 Sprague, 214; The John, 2 Dods. 366; Locke v. U. S. 7 Cranch, 339; The George, 1 Mason, 24; The Marianna Flora, 11 Wheat. 1; The Aline and Fanny, 10 Moore P. C. 491; The Mary, 9 Cranch, 126; The Maria, 11 Moore P. C. 287.

11 The Dashing Wave, 5 Wall. 170; The George, 1 Mason, 24; The La Manche, 2 Sprague, 207; The St. Antonius, 1 Act. 113.

12 The Apollon, 9 Wheat. 362.

13 The Thompson, 3 Wall. 155; Blatchf. Pr. 377.

14 The Nayade, Newb. 382; The Imina, 3 C. Rob. 167.

15 The Venus, 5 Wheat. 127.

16 The Dashing Wave, 5 Wall. 170.

17 The Liverpool Packet, 1 Gall. 529; The Beurse Van Koningberg, 2 C. Rob. 169; The Hendrick, 1 Act. 322.

18 The Henry C. Brooks, Blatchf. Pr. 99.

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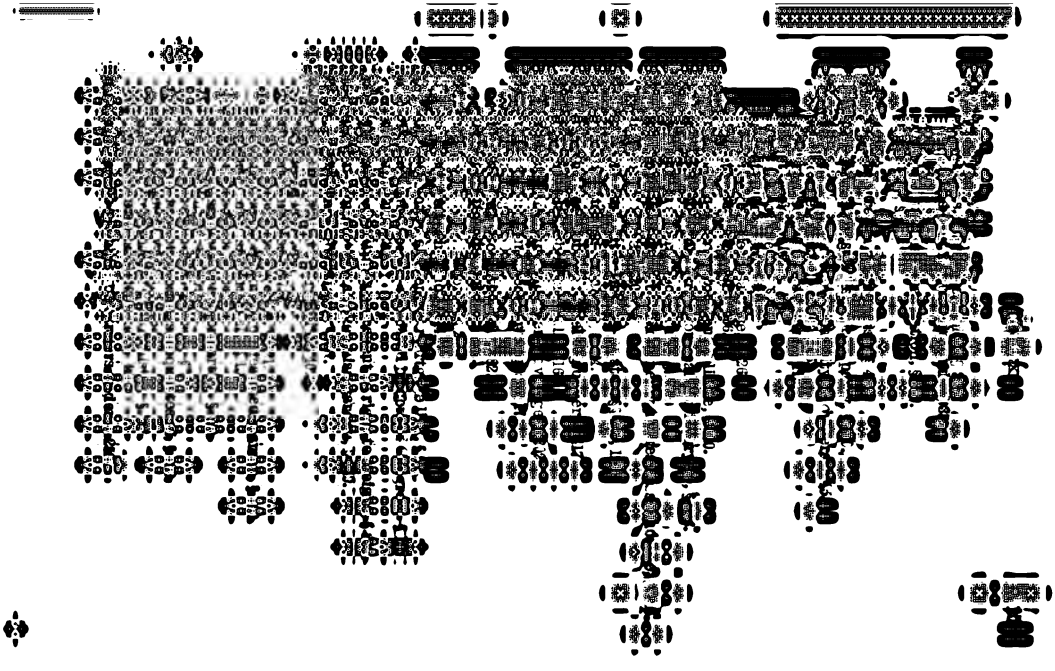

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